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MEDIALAWLETTER

Reporting Developments Through June 30, 2015

From the Executive Director's Desk

A Brief Introduction to the MLRC Staff

As I approach the end of my first year at the MLRC, there are two questions I have been asked most often. The first is when will I begin making MLRC conferences more like the ABA Boca conferences with which I had long been associated, with their sports, games and much greater downtimes. The answer to that one is that I think each conference should maintain its distinctive brand and identity and should not morph together. That said, just to add a pinch of fun, we have plans to get some tickets to an English Premier League football (that's soccer) game the weekend before our London Conference the last weekend of September – more news on that shortly. And I have a thought of devoting a lunch at our Virginia '16 Conference to The Firm Feud, a slight deviation from Journalism Jeopardy.

George Freeman

The second question usually is "How's it going; how are the folks you're working with?" And the answer to that is easy: terrific. The staff here at the MLRC really makes my job easy. They are professional, responsible, bright, devoted and a pleasure to work with. Having received a "satisfactory" in this subject in 3rd grade, I am pleased to report that they "work and play well with others." All but two have been here longer than I, so they know what we have done in the past, and how - although, importantly, they have no aversion to trying new ideas and methods. You may know a few of our staff from conferences, the Annual Dinner, and the like, but I thought I would spend the rest of this column summarizing all that they do to keep MLRC running smoothly and efficiently for its members.

Many of you know **David Heller**, who has been with the MLRC for 16 years , and serves as our institutional memory. Dave is a Deputy Director and focuses largely on the MLRC's international programs and initiatives. He is currently working on our upcoming London Conference, and has been involved in the planning of that very successful conference since its inception. He has taken the laboring oar on our March Conference on Latin American Media Law issues which has been held in Miami for the last three years. Dave also worked closely with me over the past few months on our first conference in Continental Europe, held in Paris to rave reviews in June. On a more daily basis, David is the editor of both our MediaLawDaily and our monthly

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MediaLawLetter, both signature and very popular publications of our organization.

Jeff Hermes, who came on board from the Berkman Center for Internet & Society at Harvard last October, is our other Deputy Director, and focuses largely on digital law issues. Following the success of our Digital Media Conference in Silicon Valley, Jeff is currently working on expanding the MLRC's activities in the region and our partnership with the Berkeley Center for Law & Technology by launching a series of meetings on timely digital issues. Jeff has also contributed articles on a monthly basis to this publication and has written for and edited our MLRC Bulletin with articles on intellectual property and digital media issues, including two round-table discussion which he moderated. Additionally, Jeff and I worked together on the Entertainment Law Conference in Los Angeles last January, and we are starting work on planning the next conference for Jan. 14.

Michael Norwick has been a Staff Attorney with the MLRC since 2011. Michael is the unsung editor of our three 50-state surveys, volumes on libel, privacy and employment law, each of which weighs in at over 1,000 pages. That is about to entail even more work, as we are negotiating an arrangement which would enable these tomes to be distributed in e-book style, with easy case linking capacities, as well as the traditional print. In addition, Michael also monitors media trials, and prepares MLRC's biennial Report on Trials & Damages. He also is the primary organizer of our Forum, the two-hour free program immediately preceding our Annual Dinner, which will be next November 11; Michael is currently planning that program. Stay tuned. And Michael's true labor of love is the Digital Law Conference, on which he worked hand-in-hand with Jeff.

Making sure our trains run on time is **Debby Seiden**. Many of you know Debby from the emails she sends regarding membership issues, in particular reminders to pay dues. But Debby does oh so much more than that. She has been the MLRC's Administrator for 15 years, and as such, is in charge of our budgets, our finances, and our accounts payable and receivable. Debby is our liaison with our landlord, many of our contractors, our accountants and the hotel for our Annual Dinner. Indeed, watching Debby perform her magic in the days before and at the Dinner last year was a sight to behold, from arranging table rosters, placements and arrangements to speakers' transportation to overseeing the food

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service – the list could go on. And she watches over many of the same logistical details for our Virginia conferences. Helpful to me, Debby also prepares materials for our monthly Board and DCS Board meetings.

Another absolutely key member of our staff is **Jake Wunsch**, our Production Manager. First and foremost, Jake puts together our ever-popular MediaLawDaily. Even though almost everyone on the staff contributes by spending a couple of hours every morning going through their designated publications, they then funnel the clips they've pulled to Jake, who organizes and formats the Daily. Beyond that, Jake is in charge of our website, both its content and design. Jake also is responsible for the email blasts we send, hopefully not too often, to our members; he suggests what distributions we need to make, finds photos and drafts content, and as important, is the custodian of the various lists of addressees we utilize. In addition, Jake is our technical guru and social media innovator – indeed, he is working presently on enhancing MLRC's social media presence by establishing platforms where we can have more interactive discussions, so keep an eye out for us on Twitter, Facebook and LinkedIn.

Andrew Keltz is our Assistant Administrator, helping Debby with her wide range of responsibilities. Andrew works with us part-time, enabling him to develop his acting career in his off-time – he already has had some off-Broadway roles. He does much of our nitty-gritty accounting work, including cutting a bunch of checks for me to sign at least once a week. In addition to all his clerical duties, Andrew fills in for Jake as the producer of the MediaLawDaily on those days when Jake is out of the office. Since the Daily does indeed go out every working day (with the possible exception of a few days around Christmas), this is a vital role. Andrew also helps maintain, and places new postings, on our website, and assists Michael in interfacing with our member/contributors on the 50-state surveys.

Penultimately, **Brittany Berckes** is our current Fellow. Brittany started with us in March and will be with us until September when she will take her talents to a New York City law firm. When Brittany started here, we tasked her with updating and revitalizing our brief bank. That project is ongoing, but, as so often happens around here, more urgent matters arose demanding her attention. Thus, Brittany has been the staff liaison to the State Legislative

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Committee, one of 18 committees we run (not even including some special task forces). She has devoted a lot of time to that committee, as lately it has been inundated with legislative developments – ROP, police bodycams, Anti-SLAPP bills, and drones to name just a few. Brittany also has written some articles for the MonthlyLawLetter, and done research for the 50-state surveys. Beyond all that, and totally coincidental, I promise you, Brittany twice won the NCAA Division III tennis doubles championship while in college.

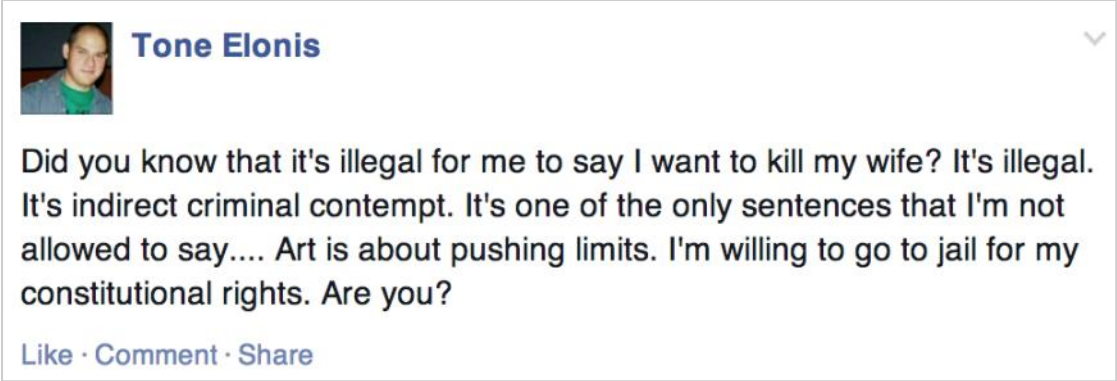
Finally, last but by no means least, is **Dorianne Van Dyke**. Dorianne is the Director of the MLRC Institute, our sister organization. The Institute, through Dorianne, runs the First Amendment Speakers' Bureau which coordinates speeches and presentations by member lawyers on media law issues at schools, libraries, bar associations and the like. Additionally, Dorianne runs the institute's First Amendment Video Contest for high school students, a competition which she is now planning for the coming fall semester. As some of you may know, the Institute's current funding runs out in September, so Dorianne has been very busy seeking sources of funding for the '15-'16 year, and beyond. If anyone knows of a gra ntor organization which might like to fund the MLRC Institute to the tune of $50,000 – $75,000 a year, or any part thereof – and its very able Director – please let us know.

Supreme Court Resolves Online Threats Case On Narrow Grounds

Leaves Legal Standards Unclear

By Jeff Hermes

On June 1, 2015, the U.S. Supreme Court decided *Elonis v. United States*, in which the Court once more grappled with questions regarding legally actionable threats. Unfortunately, while many had hoped that the Court would take the opportunity to elucidate the parameters of the "true threats" doctrine under the First Amendment, the Court resolved the case on a narrow question of statutory interpretation in a manner that does not clarify how the case is supposed to proceed upon remand to the lower court.



Proceedings Below

The case involved the arrest and prosecution of Anthony Elonis as a result of a series of Facebook posts containing "self-styled rap lyrics." The lyrics, which Elonis posted in 2010 under the pseudonym "Tone Dougie," included graphic descriptions of violence against Elonis' estranged wife, a kindergarten class, law enforcement officials, and others, as well as references to "true threats" jurisprudence under the First Amendment. Disagreeing with Elonis' legal interpretation, the Federal Bureau of Investigation arrested him and charged him with five counts of violating 18 U.S.C. § 875(c), which prohibits transmitting "any communication containing any threat ... to injure the person of another" in interstate commerce.

In 2011, Elonis was tried, convicted, and sentenced to 44 months in federal prison by the U.S. District Court for the Eastern District of Pennsylvania. At trial, the district court instructed the jury that

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> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Elonis appealed, arguing that this instruction allowed the jury to convict upon finding that he was negligent as to whether his words would be understood as a threat. He contended that the Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003), required the government to prove that he had made the statements in question with a subjective intent to threaten.

The Supreme Court granted certiorari and reversed the Third Circuit's decision. However, it did so not on the basis of the First Amendment, but based on its interpretation of the scienter requirements of the federal statute.

The U.S. Court of Appeals for the Third Circuit disagreed and affirmed Elonis' conviction. *U.S. v. Elonis*, 730 F.3d 321 (3rd Cir. 2013). The Third Circuit found that *Virginia v. Black* did not reach the question of whether the First Amendment would inject a subjective intent standard into laws criminalizing threats, because the Virginia statute in question in that case already required a subjective intent to intimidate. Rather, it found that when *Virginia v. Black* held that "true threats" under the First Amendment "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," it only indicated that the speaker must have the general intent to make the communication. The Third Circuit went on to hold that courts could apply an objective standard as to whether the statements at issue in fact communicated a threat.

Scienter Requirements under 18 U.S.C. § 875(c)

The Supreme Court granted certiorari and reversed the Third Circuit's decision. However, it did so not on the basis of the First Amendment, but based on its interpretation of the scienter requirements of the federal statute.

Invoking general principles of interpretation of criminal law, the Court held that the absence of a reference to a scienter requirement in the text of § 875(c) could not be read to indicate that the law required no proof of criminal intent. *U.S. v. Elonis*, No. 13-983 (Jun. 1, 2015), *slip op.* at 9-10. Moreover, it held that because a scienter requirement must apply to each statutory

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element that criminalizes otherwise innocent conduct, it must in this context apply to the fact that Elonis' communication contained a threat. *Id.* at 13.

On that basis, the Court held that the district court's jury instructions were inconsistent with the requirements of § 875(c). Because the district court's jury instruction incorporated a "reasonable person" negligence standard, the Court found that it was inconsistent with the requirement that the government demonstrate "awareness of some wrongdoing" as to the threatening nature of the communication. *Id.* The Court found that this error was fatal to the conviction, reversed, and remanded, holding that the government's burden could be satisfied by proof that the defendant intended to issue a threat or knew that the communication would be viewed as a threat. *Id.* at 16.

Notably, the Court expressly declined to address the question of whether it would be sufficient for the government to prove that Elonis was reckless with regard to whether his Facebook posts were threatening. *Id.* Moreover, because it reversed on statutory grounds, the Court found that it was not necessary to address the question of whether the First Amendment might require a particular state of mind. *Id.* The Court found it prudent to avoid addressing the adequacy of a recklessness standard without a decision below and proper briefing from the parties. *Id.* at 17.

The Court expressly declined to address the question of whether it would be sufficient for the government to prove that Elonis was reckless with regard to whether his Facebook posts were threatening.

On retrial, the district court will therefore be left without clear guidance as to whether to issue a recklessness instruction, leaving open the possibility of another trip through the appellate system. Justice Alito concurred in part and dissented in part for precisely this reason, stating that while he agreed that § 875(c) required more than negligence, the Court had abrogated its responsibility to provide lower courts with clear guidance by not addressing the sufficiency of a finding of recklessness. He would have held that a recklessness satisfied the statute, and that the First Amendment requires no more (noting that recklessness satisfied the First Amendment in defamation cases).

Justice Thomas dissented, criticizing the vagueness of the Court's ruling and finding that a negligence standard would satisfy both the statute and the First Amendment.

Jeff Hermes is a Deputy Director at MLRC. John P. Elwood of Vinson & Elkins, D.C., argued on behalf of Elonis before the Supreme Court. Deputy Solicitor General Michael Dreeban argued the case for the government.

Non-Disclosure Order to Reason.com Lifted

Time for Discussion of Grand Jury Subpoenas Seeking Information on Anonymous Commenters?

By Gayle C. Sproul

The frequency with which media entities are served with grand jury subpoenas for information regarding anonymous commenters has not been the subject of much, if any, public discussion. That changed on June 8, 2015, when it became public knowledge that Reason.com was served with such a subpoena. See, e.g., this legal blog post and an article in Reason.com.

Background

The subpoena sought "identifying information" regarding six commenters who made a range of comments on a Reason.com posting about the sentencing of Ross Ulbricht, creator of the Silk Road website.

The subpoena sought "identifying information" regarding six commenters who made a range of comments on a May 31, 2015 Reason.com posting about the sentencing of Ross Ulbricht, creator of the Silk Road website on the Dark Web, to life imprisonment. One of the comments said the judge "should be taken out back and shot;" another said "Why waste ammunition? Wood chippers get the message across clearly. Especially if you feed them in feet first." And another said: "I hope there is a special place in hell reserved for that horrible woman."

Apparently, the comments were uniformly perceived by the U.S. Attorney's office for the Southern District of New York as, at least potentially, true threats to the judge. Along with the subpoena, the U.S. Attorney also served a letter, in which he asked that Reason.com keep the subpoena a secret, although he also made clear that Reason was not obliged to do so. He also asked that Reason.com advise his office if it intended to disclose the existence of the subpoena before doing so.

Reason.com evaluated its options: (1) respond without notifying the commenters; (2) notify the commenters and allow them to file motions to quash, withholding any information pertaining to those who filed such motions; or (3) move to quash the subpoena in whole or in part. Option one was quickly discarded. Option three was considered but was rejected because it seemed highly unlikely, based on the facts and the law, including cases such as *In re Grand Jury Subpoena* No. 11116275**,** 846 F.Supp.2d 1 (D.D.C. 2012), that a federal judge would foreclose the investigation into alleged threats made against a colleague. Reason.com chose

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Reason article on the subpoena. Click to read.

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option two, and determined that it would, in accordance with the U.S. Attorney's request, notify him that it would disclose the subpoena to the commenters. Reason.com also hoped to persuade the U.S. Attorney to drop the subpoena as to the more benign comments.

The Assistant U.S. Attorney assigned to the matter would not hear of trimming the more innocuous comments from the subpoena and expressed outrage at Reason.com's proposed course of action. He argued, incorrectly, that the commenters had no basis to quash the subpoena because they had no First Amendment right to speak anonymously. He further threatened that Reason.com's intentions came close to interfering with a grand jury investigation, even though he had signed the letter telling Reason.com it was not bound to keep the subpoena a secret. The phone call ended abruptly, and Reason.com promptly forwarded the subpoena to the commenters, letting them know that if it received notice that they had filed a motion to quash before the return date, Reason.com would not produce their information on that date.

Gag Order

Later that day, Reason.com was sent a "non-disclosure" or gag order, *see* 18 U.S.C. § 2705 (b), obtained *ex parte*, prohibiting Reason.com from "disclos[ing] the existence of this Order or the attached subpoena to the listed subscriber of the account referenced in the subpoena, or to any other person," other than an attorney. However, the horse, by that time, was out of the barn.

The next day, on a Friday afternoon, the AUSA notified Reason.com's counsel that he had reason to believe that it had violated the gag order, which was not the case, and that he was going to investigate this alleged, but non-existent, violation of the order. It appears he suspected that the order was violated because a well-known legal blog, Popehat, had called him for comment regarding the subpoena. In fact, as Popehat subsequently stated, it did not receive the subpoena from anyone at Reason.com.

Popehat's June 8 blog post about the subpoena set off a firestorm, as bloggers from the *Washington Post* to the *Wall Street Journal* commented about the lack of a "true threat" in the

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comments (referring to the recent ruling in *U.S. v. Elonis*) and the overreaching of the government, and speculated about the existence of an order gagging Reason.com, which, in contrast to all others, was now strangely silent.

In fact, Reason.com was preparing to file papers asking the Magistrate Judge who signed the gag order to vacate it. Reason argued that the gag order was improvidently granted, was an unjustifiable prior restraint and was moot in any event, now that the subpoena was public knowledge. Reason.com notified the AUSA of its intention to move to have the order lifted, explaining its rationale, and asked that the government join Reason.com in its request. The next morning, on June 19, the AUSA asked the court, again *ex parte*, to vacate the order, which it quickly did.

Reason.com hopes that its experience coming to light will spur discussion among media entities and their counsel about the best ways to deal with these subpoenas and the non-disclosure orders that sometimes accompany the subpoenas, as they continue to be served.

Gayle C. Sproul is a partner in the Philadelphia office of Levine Sullivan Koch & Schulz, LLP and represented Reason.com in this matter.

Historian Wins Release of Grand Jury Records of Espionage Investigation of Chicago Tribune

WW II Investigation Was First and Only Effort to Prosecute Major Newspaper for Espionage

By Brendan Healey

President Roosevelt was livid.

The United States had broken the top-secret code of the Imperial Japanese Navy—one of the more closely guarded United States secrets of World War II—and President Roosevelt believed the *Chicago Tribune* had just disclosed the classified information in a front-page story about the Battle of Midway.

The *Tribune* story stated that the U.S. Navy knew days in advance of the attack on Midway exactly which Japanese ships would be involved and where they would be. Armed with this "definite" "advance information," the Navy earned a decisive victory, one that many believe marked a turning point in the Pacific theater.

It was the first and only time in United States history that the United States government has attempted to prosecute a major newspaper for violation of the Espionage Act.

Nonetheless, many in Washington were angry with the *Tribune* for allegedly exposing the intelligence coup. Frank Knox, Secretary of the Navy, recommended that "immediate action be taken" against the *Tribune*, and, in the summer of 1942, a federal grand jury convened in Chicago to investigate whether the *Tribune* and its reporter had violated the Espionage Act.

It was the first and only time in United States history that the United States government has attempted to prosecute a major newspaper for violation of the Espionage Act. The grand jury heard testimony from the *Tribune* reporter as well as editors and Navy personnel but ultimately decided not to issue an indictment.

The story received press coverage over the years—particularly in light of recent high profile disclosures involving Chelsea (formerly Bradley) Manning and Edward Snowden—but, for nearly 73 years, the grand jury records were closed.

On November 18, 2014, historian Elliot Carlson filed a petition in the Northern District of Illinois seeking release of the grand jury transcripts from August of 1942. Carlson, an award-winning author and former newspaper reporter, is writing a book for the Naval Institute Press about the incident and the subsequent action against the *Tribune*. Carlson has spent years researching and writing his book and has collected thousands of pages of historical records, but he was denied access to the grand jury transcripts.

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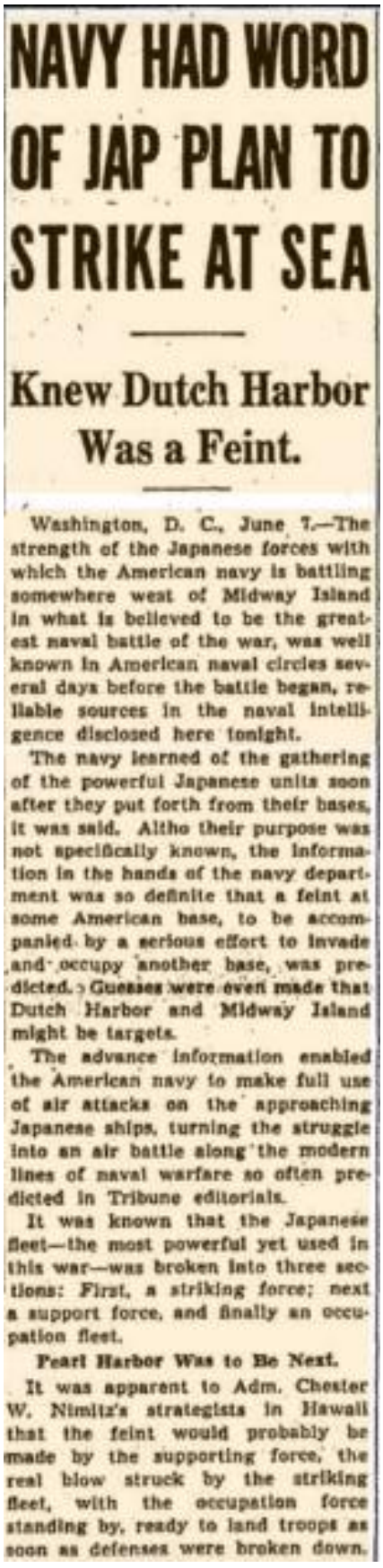

NAVY HAD WORD OF JAP PLAN TO STRIKE AT SEA

Knew Dutch Harbor Was a Feint.

Washington, D. C., June 7.—The strength of the Japanese forces with which the American navy is battling somewhere west of Midway Island in what is believed to be the greatest naval battle of the war, was well known in American naval circles several days before the battle began, reliable sources in the naval intelligence disclosed here tonight.

The navy learned of the gathering of the powerful Japanese units soon after they put forth from their bases, it was said. Altho their purpose was not specifically known, the information in the hands of the navy department was so definite that a feint at some American base, to be accompanied by a serious effort to invade and occupy another base, was predicted. Guesses were even made that Dutch Harbor and Midway Island might be targets.

The advance information enabled the American navy to make full use of air attacks on the approaching Japanese ships, turning the struggle into an air battle along the modern lines of naval warfare so often predicted in Tribune editorials.

It was known that the Japanese fleet—the most powerful yet used in this war—was broken into three sections: First, a striking force; next a support force, and finally an occupation fleet.

Pearl Harbor Was to Be Next.

It was apparent to Adm. Chester W. Nimitz's strategists in Hawaii that the feint would probably be made by the supporting force, the real blow struck by the striking fleet, with the occupation force standing by, ready to land troops as soon as defenses were broken down.

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Carlson was joined on the petition by the Reporters Committee for Freedom of the Press, which also prepared the petition and supporting memorandum in conjunction with outside counsel, as well as the American Historical Association, the National Security Archive, the Naval Historical Foundation, the Naval Institute Press, the Organization of American Historians, and the Society for Military History.

Petitioners argued, among other things, that the court has the inherent authority to order the disclosure of grand jury records and that, given the age of the records, the death of all the witnesses, and the historical significance of the records, they should be disclosed.

The government opposed the petition and argued that the court did not have inherent authority to order disclosure.

On June 10, 2015, Ruben Castillo, Chief Judge of the Northern District of Illinois, ruled in petitioners' favor and ordered release of the transcripts. *Carlson v. United States*.

Chief Judge Castillo noted the "long-standing tradition" of grand jury secrecy but emphasized that "the rule of grand jury secrecy is not absolute." Federal Rule of Criminal Procedure 6 (e) lists several circumstances under which a court can release grand jury materials. Petitioners' situation did not fall under any of the enumerated exceptions in 6(e), though, so the court addressed the question of whether it could order release under its inherent authority.

The court noted that, by its terms, Rule 6(e) is not limited to the enumerated exceptions. Moreover, the court discussed how "numerous other federal courts" have determined that courts have inherent discretion to disclose grand jury proceedings. Accordingly, the court determined that it would "join[]those courts in concluding that in appropriate circumstances, federal courts possess inherent authority to release grand jury materials for reasons other than those contained in Rule 6(e)."

Having determined that it could release the transcripts, the court then turned to whether it should do so. The court adopted the Second Circuit's nine-factor test for whether to release grand jury transcripts based on their historical significance: (1)

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identity of the party seeking disclosure; (2) whether the government or defendant objects; (3) why disclosure is sought; (4) what information is sought; (5) how long ago the grand jury proceeding occurred; (6) current status of the principals and their families; (7) the extent to which the information is already public; (8) whether the witnesses are still alive; and (9) any additional need for maintaining secrecy. *See In re Craig*, l3l F.3d 99 (2dCir.1997).

The court found that six of the nine factors (numbers 1, 2, 3, 4, 5, and 7) favored petitioners. With regard to the third and fourth factors (why disclosure is sought and what information is sought), the court noted that "the *Tribune* investigation implicates broader principles, namely, the relationship between the government and press in a democratic society, particularly as to matter impacting national security."

The court found that disclosure would have minimal impact on the witnesses and their families, noting that the last known grand jury witness died in 1997. There were unidentified witnesses, but any survivors would almost certainly be over 100 years old. Finally, the court found no other reasons for maintaining secrecy—the government had not identified any national security concerns and no one other than the government objected to disclosure.

Accordingly, the court ordered disclosure of these long-ago yet still timely grand jury records.

A few other footnotes of historical interest in the case:

- Frank Knox, the Navy Secretary who vigorously advocated for the prosecution of the *Tribune*, was the former publisher of the Chicago *Daily News* and a long-time rival of Colonel Robert McCormick, the *Tribune* publisher. Moreover, as the *Tribune* pointed out at the time, Knox continued to be paid by the *Daily News* while he was working for the government.
- Notwithstanding the *Tribune* and other papers' putative disclosure of the code-breaking, the Japanese Navy continued to use the same basic code (with some tweaking) through the end of the war.
- Earlier in the war, the Navy failed to ask *Tribune* correspondent Stanley Johnston, who provided the reporting for the story and later testified before the grand jury, to sign accreditation papers. Although he was given oral instructions to submit his materials for censorship, he was not asked to sign a formal, written commitment.

The Petitioners were represented by Brendan Healey of Mandell Menkes LLC. The government was represented by Elizabeth Shapiro from the U.S. Department of Justice and Daniel Gillogly and Mark Schneider from the Northern District of Illinois U.S. Attorney's Office.

Witness for the Press: A Few Thoughts on the Gentle Art of Testifying Before Congress

By David McCraw

I can say this much about my first time testifying before Congress: At least the committee chair did not accuse me of "living in la-la land."

That sad fate was reserved for another witness, Melanie Pustay, whose office at the Justice Department oversees the Freedom of Information Act. Ms. Pustay found herself facing the wrath of the House Committee on Oversight and Government Reform as she tried to defend the work being done by FOIA officers across the government during committee hearings in early June.

I had a much easier time of it. For my appearance as a witness I was slotted onto a panel with four journalists. The Democrats in Congress have long had a low-burn interest in FOIA and led the way to the last round of reforms in 2007. But the zeal this time around is all coming from the Republican side, newly fired up by the revelations that Hillary Clinton used a private email system while Secretary of State and the loss of emails sought in a congressional investigation of the Internal Revenue Service.

I can say this much about my first time testifying before Congress: At least the committee chair did not accuse me of "living in la-la land."

The House committee has already approved a FOIA reform bill this term, and a Senate committee has sent a similar bill to the floor. Both bills await further action, and there is widespread bipartisan support. Among other things, the bills would give new authority to the Office of Government Information Services – the so-called FOIA ombudsman office – and impose limits on Exemption 5, which is widely used by agencies to withhold intra-agency and inter-agency communications. The bills also call on the agencies to employ modern technology to process and respond to FOIA requests.

But the legislative measures were not front and center at the June hearing. Instead, the committee was interested in hearing about why FOIA was so broken, everything from the endless delays to the arbitrary denials. The hearing was set up in three panels: one for the news media, one for advocacy groups, and a final one for FOIA officials.

In the days leading up to the hearing, the political fault lines that run through Congress were hardly hidden. The Republican staffers called and wanted to know whether I had good examples of terrible experiences with the Department of State or IRS. (I didn't.) The Democratic staffers were soon on the line, nudging me to praise a new law that requires

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government emails on private servers to be turned over to the appropriate agency within 20 days. (No problem there.) "How likely is it that I'll be asked about Hillary Clinton's emails?" I wanted to know. "Oh, about 100 percent," the staffer responded. (Shockingly, she was wrong.)

Screen-grab from congressional hearing - click to view. McCraw's testimony begins at 53:38.

My fellow panelists were an interesting array. There was Cheryl Attkisson, the former CBS correspondent who now has a $35 million lawsuit claiming that the Department of Justice planted spyware on her computer. Leah Goodman from Newsweek testified that she never used FOIA because it was so dysfunctional. She spent much of her time as a witness complaining about government officials who wouldn't talk to reporters on the record. At the other extreme was Jason Leopold from Vice, a habitual FOIA user – he's been called a "FOIA terrorist" – who has filed a string of lawsuits over the past five years.

Then there was Terry Anderson, the former AP correspondent who was kidnapped in Lebanon in 1985 and held for more than six years. Terry has no serious competitors for the most outrageous FOIA war story of all time. Upon his release, he filed FOIA requests with more than 10 agencies seeking information about his kidnapping. The first agency to respond told him that because of the federal Privacy Act he needed to get a privacy waiver from his kidnappers before the agency could disclose information about them.

That left me to play the law wonk, addressing technical issues in the statute and agency processes – a very good place to be, not only because I am, well, a law wonk, but also because I didn't want to get caught in the political crossfire between the committee's Obama-bashers and Obama-defenders. My prepared testimony focused on fairly straightforward FOIA concerns: the failure of agencies to meet statutory deadlines, unresponsive bureaucrats, and the endless delays caused when agencies decide to refer a request to other agencies for consultation.

I protested the byzantine process that agencies use when requesters seek information submitted by corporations and the agencies decide they must first consult with the submitters. The Department of Labor once wrote me a straight-faced letter saying it would need 15 years to complete the process. The letter even broke out the department's calculation into the hours and minutes the job would take. (We sued, and a federal judge was not amused by the department's math. She ordered the documents released.)

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I also talked about how The Times has often been forced to use litigation not to resolve any real legal dispute but simply to get an agency to respond. A citizen's right to get a timely response, I testified, should not turn on whether he or she has the resources and know-how to litigate. Of course that now applies to financially challenged news organizations as well. The nonprofit group TRAC found that The New York Times was the only legacy media organization in the country to file a FOIA suit in 2014. We filed eight.

Each of us on the panel was given five minutes to speak and then it was question time for the committee. The good news is that members are limited to five minutes. The bad news is that there are 43 people on the committee, many of whom showed up for the hearing. Two and a half hours after we had begun, we were still planted at the table fielding questions under oath. The Democrats proceeded with caution, reluctant to throw the current administration under the bus. Elijah Cummings, the committee's ranking Democrat, conceded that there were problems but criticized Congress for failing to provide an adequate budget for FOIA. He put up a PowerPoint slide showing that the number of FOIA requests was up but the number of FOIA officers had declined.

I protested the byzantine process that agencies use when requesters seek information submitted by corporations and the agencies decide they must first consult with the submitters.

The committee's questions rolled across a vast political and legal landscape. The representative from the Virgin Islands asked me a detailed and precise question about the scope of Exemption 5 and the policy reasons underlying it. Another member quizzed me on whether newsgathering was covered in the text of the First Amendment. One representative who had been in state government in Virginia spoke of how fast the process typically worked at the state level, while bemoaning the inevitable problem of burdensome and far-reaching requests. Another Democrat pointed out that the Department of Homeland Security was among the worst agencies in FOIA response statistics. He has proposed a special bill dealing solely with DHS delay.

Then there was Representative Trey Gowdy, one of the House's most prominent conservatives. He prefaced his questions by saying that he strangely found himself agreeing with The New York Times and wondered whether that meant we were both right or that the apocalypse was upon us.

But most of the questioning for me centered on the bit of my testimony that described a "culture of unresponsiveness" at the agencies.

I testified that FOIA officers seemed to live in a culture of fear, afraid that they would make a mistake and release something that should have been withheld. Asked what the House could do, I sketched out some minor changes, but said the big ticket item for Congress was a serious effort to amend the exemptions and undo much bad law, which has made the exemptions unwieldy and unyielding.

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We had not gone very deep into the questioning before the first political tussle broke out. The committee chairman, Jason Chaffetz of Utah, read a White House memo that called upon the agencies to send politically sensitive FOIA responses to the President's lawyers prior to release. A Democrat quickly rose up to read from a similar memo that had been sent out during the Reagan administration. A Republican promptly followed with his own analysis of why the two memos were different (and, yes, why Obama's was so much more troubling).

As the afternoon wore on, some of the Republican members bore down on the panel trying to fish out testimony that the Obama administration's record on FOIA was worse than that under George W. Bush. My diplomatic, and sadly true, response – FOIA has been bad throughout every administration – was not the answer they were looking for. "Is this your first time testifying before Congress?" one member asked each of us. Then things must be really bad now for you to show up, he proposed. Jason Leopold, who had savaged the Obama administration's FOIA performance, tried to set the record a little straighter. Obama had raised hopes that things were going to get better, he said; under Bush he knew he never had a shot. His answer was cut off.

Several members of the committee were keenly interested in Leah Goodman's claim that she was the only Washington reporter to show up because others feared there would be reprisals against any news organization that appeared. She said she had heard that repeatedly from Washington bureau chiefs when she was looking for people who might be interested in testifying. (The New York Times obviously felt differently, although we decided that it was better for a corporate representative rather than a journalist to appear.)

Much less interest was shown in another dramatic moment in the testimony. In his prepared remarks, Terry Anderson took a sharp detour from FOIA to proclaim that Edward Snowden should not be in Russia and Chelsea Manning should not be in prison but instead they should be in Washington being feted at black-tie dinners. (Terry told me beforehand that he was going to say that. I thought he was kidding.) The committee members chose not to touch that one.

And for reasons that remain puzzling, no one felt the need to ask a direct question about Hillary Clinton and her private email account, although one committee member lobbed in a convoluted question about whether federal employees violate the law if they look for ways to avoid creating documents in hopes of thwarting FOIA.

For all the meandering discussion and political polarization, the important takeaway was that FOIA reform has become, at least for the moment, a bipartisan issue. Whether that can be translated into meaningful reform remains to be seen.

Meanwhile, from the "not so surprising" file . . . Imagine how many cranky citizens and incarcerated individuals heard about my testimony, found my email address, and now desperately need my help with FOIA requests that will – guaranteed! – blow the lid off everything. If only they could get a response.

David McCraw is vice president and assistant general counsel at The New York Times Co.

Next Gen Report:
Facing Public Records Concerns, Cuomo Abandons Email Purge Policy

A long-stewing battle over the Governor's implementation of a records retention policy that would have required the ongoing, automated deletion of vast swaths of public records was recently averted. The Cuomo administration has withdrawn the policy, and though the full scope of interim email purges remains uncertain, the legislative attention it generated may provide an opportunity to address problematic aspects of the Freedom of Information Law ("FOIL") itself.

Background

On June 18, 2013, then-Attorney General Cuomo's office announced a new email purge policy, and directed the general counsels of all state agencies to begin implementing it. Under the Policy, all emails older than 90 days would be automatically deleted unless marked for preservation by individual document custodians.[1] The Policy quietly took effect on June 20, 2013, and was gradually implemented through 2015 as the agencies migrated all government emails to a centralized server. On February 20, 2015, the Cuomo administration issued a memorandum to the head of every agency announcing the Policy's implementation.[2] Agency employees received similar directives, informing them deletion would begin on February 23.[3]

A long-stewing battle over the Governor's implementation of a records retention policy that would have required the ongoing, automated deletion of vast swaths of public records was recently averted.

The Policy drew immediate and widespread concern, principally because a 90-day time period controverts the purpose and function of FOIL.[4] Under the Policy, year-old records necessary to understand present-day agency actions would disappear. Although FOIL itself does not constrain agencies to retain records in perpetuity, a 90-day retention policy is an outlier among public records regimes: as commenters pointed out, the federal government has adopted a 7-year retention period, as have many states.[5]

Moreover, the Policy virtually required improper denials of FOIL requests. Even assuming instantaneous transmission of the full scope of a request to all possible records custodians, an immediate search for responsive records, and immediate and complete preservation of all responsive emails, emails from day 89 of the 90-day retention period would already have been deleted, even if they existed at the time of the request, by the time of the agency's (lawful)

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response within the initial five-day period.[6] Worse, as FOIL users and practitioners well know, delays by agencies in responding to requests are de rigueur. Agencies can lawfully delay their response by a "reasonable" time,[7] and as a matter of practice, issue serial delay letters with impunity. Moreover, though "duty-bound to conduct a 'diligent search' of the records in its possession responsive to [a FOIL] request,"[8] agencies often issue blanket denials before conducting searches. Additionally, by asking individual employees to identify and segregate responsive records, instead of public records officers responsible for FOIL compliance, the Policy invited incomplete retention. For any of these reasons, large swaths of public records might not be timely or properly identified for preservation, and may have fallen irretrievably through the cracks.

These concerns were not lost on legislators, several of whom introduced bills requiring retention for seven years.[9] In response, the Attorney General announced that the Cuomo administration would work with legislators to develop a new policy, and promised to would hold a transparency summit.[10] The "summit" turned out to be a small meeting two months later in the Governor's Manhattan office,[11] but the message had been received: on May 22, 2015, the Cuomo administration terminated the policy.[12]

Though public interest and news organizations successfully brought public pressure to bear on receptive voices in Albany, unresolved questions about the full scope of email purges during the Policy's two-year pendency remain. Requestors seeking access to information between June 2013 and May 2015 would be well-advised to consider whether responsive records have been deleted, and, if necessary, probe that issue through FOIL requests about implementation of retention policies by their target agencies. Additionally, as the plaintiff in a lawsuit against the Cuomo administration have recently discovered, automatic deletion of courts may be unwilling to sanction the deletion of potentially relevant emails as spoliation when sought in discovery, and parties to litigation against government agencies should be advised that discoverable records from 2013 to 2015 may have been irretrievably lost.[13]

On a more positive note, the abortive Policy has triggered attention to government transparency in Albany that could usefully be redirected to address FOIL's chief deficiency: the impunity with which agencies delay responding to requests for public records. News organizations, public interest organizations, and other parties that rely heavily on FOIL should take this opportunity to consider whether a focused coalition, capable of assembling statistically significant data about delays and improper denials, might be as successful in achieving measured FOIL reform as they were in opposing the Policy.

Patrick Kabat is an associate at Levine Sullivan Koch & Schulz, LLP, and is a member of the MLRC's Next Generation Committee.

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Notes

[1] Karen Gedulding, Memorandum: Email Consolidation and Email Management (June 18, 2013), available at http://www.propublica.org/documents/item/1184686-foil-2014-08-production.html

[2] Maggie Miller, Memorandum: Update on Migration to Office365 (Feb. 20, 2015), available at http://www.capitalnewyork.com/sites/default/files/150220_ITS_Memo.pdf.

[3]Jimmy Vielkind, Cuomo Administration Begins Large-Scale Email Purges, Capital New York (Feb. 25, 2015), available at http://www.capitalnewyork.com/article/albany/2015/02/8562835/cuomo-administration-begins-large-scale-email-purges

[4] N.Y. Pub. Off. Law § 84 ("The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society.")

[5] E.g. Letter of BetaNYC et al. (Jan. 29, 2015), available at http://www.capitalnewyork.com/sites/default/files/150129_E-mail_Retention_Letter.pdf.

[6] N.Y. Pub. Off. Law § 89(3).

[7] Id.

[8] West Harlem Bus. Grp. v. Empire State Dev. Corp., 13 N.Y.3d 882, 884 (2009).

[9] Jimmy Vielkind, Lawmakers move to end Cuomo's email purges, Capital New York (Mar. 12, 2015), available at http://www.capitalnewyork.com/article/albany/2015/03/8563924/lawmakers-move-end-cuomos-email-purges.

[10] immy Vielkind, Cuomo suggests summit on email policy, Capital New York (Mar. 12, 2015), available at http://www.capitalnewyork.com/article/albany/2015/03/8563998/cuomo-suggests-summit-email-policy.

[11] Thomas Kaplan, Cuomo Administration Ends 90-Day Rule on Deleting State Workers' Email, The New York Times (May 22, 2015), available at http://

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www.nytimes.com/2015/05/23/nyregion/cuomo-administration-ends-90-day-rule-on-deleting-state-workers-email.html?_r=0.

[12] Id.

[13] Order, Wandering Dago, Inc. v. New York State Office of General Services et al., No. 1:13-cv-01053-MAD-RFT, Dkt. 153 (May 29, 2015).

Pennsylvania Supreme Court Hears Two Newspaper Cases

By Kevin C. Abbott and J. Timothy Hinton, Jr.

In the first half of 2015, the Pennsylvania Supreme Court has heard oral arguments in two appeals of newspaper cases, both involving the *Scranton Times*. Both cases have the potential to affect Pennsylvania defamation law. No decisions have been issued yet.

Joseph v. The Scranton Times

In 2002, Thomas Joseph, his printing business, two airport limousine businesses, and his son sued *The Scranton Times* and its reporters for a series of ten articles that appeared in the *Citizens' Voice* newspaper in Wilkes-Barre, Pennsylvania in 2001. The articles reported on the searches of Joseph's home and business as part of a federal criminal investigation into Joseph's alleged ties to organized crime and to William D'Elia, the reputed head of organized crime in the area. No criminal charges were brought against Joseph.

In the first half of 2015, the Pennsylvania Supreme Court has heard oral arguments in two appeals of newspaper cases, both involving the Scranton Times. Both cases have the potential to affect Pennsylvania defamation law.

The case has followed a long and twisting trail.

This case was first tried in 2006. Following a nonjury trial, former judge Mark Ciavarella entered a judgment of $3.5 million in favor of Joseph and his printing business. On the *Citizens' Voice's* appeal, the Superior Court deferred to former judge Ciavarella's findings and affirmed. *See Joseph v. Scranton Times, L.P.*, 959 A.2d 322 (Pa. Super. 2008). When evidence was discovered that the nonjury trial had been improperly steered to Ciavarella by former president judge Michael Conahan, that Ciavarella and Conahan were involved in a criminal conspiracy (popularly termed the "Kids for Cash" scandal), and that Conahan frequently met with D'Elia, the Supreme Court vacated the first judgment based on its finding that the first trial "was infected with the appearance of judicial impropriety" and ordered a new trial. *Joseph v. Scranton Times, L.P.*, 987 A.2d 633, 635 (Pa. 2009).

The second nonjury trial was conducted in 2011 before Judge Joseph Van Jura. After hearing two weeks of testimony, Judge Van Jura found that Joseph and his witnesses were not credible, that the plaintiffs did not prove any injury caused by the allegedly false statements in the articles, and thus plaintiffs had not proven one of the essential liability elements of a defamation claim. Because it found that the plaintiffs had not proven the injury element, the

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trial court did not render findings on the other elements—including the constitutional falsity and fault elements. The trial court entered judgment in favor of the *Citizens' Voice*. Joseph appealed and the Superior Court affirmed the trial court's dismissal of the claims by Joseph's business but reversed the trial court's judgment against Joseph and his son.

The Superior Court held that the plaintiffs' own testimony of embarrassment and humiliation resulting from the articles justified an award of damages. The Superior Court announced two new legal principles in Pennsylvania defamation law: (1) a defamation plaintiff need not prove reputational injury and instead may establish the injury element based solely on his own testimony that he was humiliated and embarrassed; and (2) a defamation plaintiff is entirely relieved of his burden to prove actual injury caused by the alleged defamatory statements if he proves actual malice. The Superior Court reasoned that the trial court must have determined that the plaintiffs had proved liability, including the constitutional requirements to prove falsity and fault, by virtue of the fact that it reached the damages issue. Accordingly, the case was remanded to determine the issues of actual malice and damages.

The Pennsylvania Supreme Court granted the *Scranton Times'* petition for allowance of appeal on four issues:

1. Whether an appellate court may disregard the foundational rules requiring deference to the trial court's factual findings and credibility determinations?
2. Whether a court may disregard the First Amendment constraints on defamation actions by concluding that the injury-in-fact liability element of a defamation claim is established without proof of reputational harm caused by defamatory statements?
3. Whether a court may disregard the First Amendment constraints on defamation actions by holding that proof of actual malice relieves plaintiffs of their burden to prove injury-in-fact?
4. Whether a court may disregard the First Amendment constraints that require a defamation plaintiff to prove falsity and fault on the part of a media defendant and order a retrial on damages only where the record does not establish that a plaintiff met his constitutional burdens?

Oral argument was heard on May 6, 2015.

The *Scranton Times* is represented on appeal by J. Timothy Hinton, Jr. of Haggerty Hinton & Cosgrove LLP in Scranton and Kevin C. Abbott, Kim K. Watterson and Justin H. Werner of Reed Smith LLP in Pittsburgh. Gayle C. Sproul of Levine Sullivan Koch & Schulz, LLP filed

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an amicus brief on behalf of The Pennsylvania Newsmedia Association and Pennsylvania Freedom of Information Coalition. The amicus focused on the issues accepted by the Court as to whether a defamation plaintiff must prove that the allegedly defamatory statements actually caused harm to reputation. The Plaintiffs are represented by George C. Croner of Kohn, Swift & Graf, P.C. in Philadelphia and Timothy P. Polishan of Kelley, Polishan, Walsh & Solfanelli, LLC in Old Forge.

Castellani and Corcoran v. The Scranton Times, L.P.

In the second action pending before the Supreme Court, the Court is going to issue its third pretrial ruling in this libel action, this time deciding an evidentiary issue.

In 2003, the *Scranton Times* published a series of articles on the investigation into various allegations of criminal misconduct at the Lackawanna County Prison. At the time, the Prison was overseen by the prison board. The majority county commissioners, Joseph Corcoran and Randy Castellani sat on the board and Castellani was the chairman. In December 2003, the two commissioners were subpoenaed to testify before a statewide grand jury investigating the prison.

In 2003, the Scranton Times published a series of articles on the investigation into various allegations of criminal misconduct at the Lackawanna County Prison.

In January 2004 the *Scranton Times* published an article about the grand jurors' reaction to the commissioners' grand jury testimony. The article cited a source close to the investigation as saying that the grand jury believed that the commissioners' testimony was "vague," "less than candid," "evasive," and that the grand jurors thought that the commissioners were "considerably less than cooperative." After the publication of the January 2004 article, the supervising judge of the grand jury conducted his own investigation into whether any person sworn to secrecy had violated that oath by providing information to the newspaper.

In September 2004, the supervising judge issued an opinion finding no violations of grand jury secrecy. In addition, the opinion stated that the January 2004 article was "completely at variance with the transcript of the testimony" of the Commissioners. The *Scranton Times* published a story reporting the judge's findings and included a statement that the source had been contacted and stood by his account of the grand jury's reaction. In 2005, a second grand jury supervising judge offered his opinion that the January 2004 article was false. Again, the *Scranton Times* reported on the judge's statement and said that the newspaper stood by its report. Neither of the grand jury judges had the issue of falsity of the January 2004 article

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before them, neither took testimony on the issue, and neither held any judicial proceedings on the issue.

The commissioners brought two separate libel claims, one as to the January 2004 article and one as to the September 2004 article, and the actions were consolidated. As public officials suing on articles of public concern, the First Amendment required the commissioners to prove that the articles were false and published with actual malice. The commissioners originally contended that the opinions of the two grand jury judges proved that the January 2004 article was false. The trial court rejected that argument. The commissioners then argued that the opinions, and the articles about them, were admissible evidence of actual malice. Relying heavily on the Pennsylvania Supreme Court opinion in *Weaver v. Lancaster Newspapers*, 926 A.2d 899 (Pa. 2007), the commissioners argued that the grand jury judges' opinions put the newspaper on notice that the January 2004 article was false and that the newspaper standing by its original story, in the face of such notice, was a republication and evidence that the original story was published with actual malice.

The trial court disagreed, holding that the opinions were inadmissible. The Superior Court, in an unpublished opinion, *Castellani, et al v. The Scranton Times L.P., et al*, No. 117 MAL 2014 (March 11, 2014), affirmed for three independent reasons: (1) *Weaver* is not on point because the judges' opinions did not provide the newspaper with verifiable notice that its original story was false; (2) even if relevant under *Weaver*, the judges' opinions were inadmissible hearsay because they reflected only the judges' personal opinions; and (3) even if relevant and not hearsay, the opinions were inadmissible because any probative value the opinions might have would be outweighed by the unfair prejudice of letting the jury charged with deciding the issue of falsity hear the judges' personal opinions in that very issue. The Supreme Court accepted the commissioners' petition for allowance of appeal.

Oral argument was heard on April 8, 2015. In its two previous pretrial rulings, the Supreme Court held that the Shield Law protected the newspaper's confidential source, *Castellani v. Scranton Times, L.P.*, 956 A.2d 937 (Pa. 2008) and also, in an unpublished order, denied the parties access to grand jury materials (including the transcript of Mr. Corcoran's testimony – the parties already had Mr. Castellani's transcript).

The Scranton Times is represented by J. Timothy Hinton, Jr. of Haggerty Hinton & Cosgrove LLP in Scranton and Kevin C. Abbott, Kim M. Watterson and Justin H. Werner of Reed Smith LLP in Pittsburgh. The Plaintiffs are represented by Richard A. Sprague and Thomas A. Sprague of Sprague & Sprague in Philadelphia.

Presumed Damages Suffer Further Blow in New Jersey

Private Plaintiffs Cannot Seek Both General Damages And Presumed Damages

By Bruce S. Rosen

The New Jersey Supreme Court has clarified and confirmed its 2012 decision in *W.J.A. v. D.A.*, 210 NJ 229, ruling that private defamation plaintiffs without concrete proof of damages are limited to nominal presumed damages – essentially allowing those with the resources to pursue a trial for vindication without damages.

In *NuWave Investment Corp. v. Hyman Beck & Co.*, (A-81-13 May 27, 2015), the Court made clear that private plaintiffs cannot seek both general damages and presumed damages – and for general damages plaintiffs must show "actual harm, demonstrated through competent evidence," and may not include a damage award presumed by the jury.

The Court made clear that private plaintiffs cannot seek both general damages and presumed damages – and for general damages plaintiffs must show "actual harm, demonstrated through competent evidence," and may not include a damage award presumed by the jury.

The Court's pronouncement in *W.J.A.* had been met with skepticism from those in the bar who could not seem to believe that the Court had eliminated presumed damages in defamation cases. *NuWave* was tried before *W.J.A.* was issued, and there the court had instructed the jury that presumed damages could be awarded for reputation harm, "permitting the jury to presume reputational harm in this case enabled the jury to exercise an impermissible degree of unbridled discretion to award damages that may not have reflected evidence that was submitted."

The *NuWave* Court court struck down $1.2 million of what appeared to be presumed damage awards in the case, which involved defamation claims involving investigative reports for the financial industry. Because the jury instruction was not clear as to how much was awarded on the basis of actual damages or presumed damages, the court said it was vacating the entire award and sent the matter back for a new trial on damages.

In the 5-0 per curium decision (with two justices recused) the Court explained that there were three types of defamation damages, actual (compensatory), punitive and nominal. Actual damage has two subcategories, special (for specific economic or pecuniary loss) and general, which is not capable of precise monetary calculation. While actual damages can include emotional distress that flows from the reputational issues, "all compensatory damages, whether considered special or general, depend on showings of actual harm, demonstrated through

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competent evidence, and may not include a damage award presumed by the jury," the Court explained.

The court said that presumed damages are "not to be awarded as compensation and are not appropriate when compensatory damages are available to the plaintiff." Although the Court touted the continued necessity for presumed damages in W.J.A., the NuWave decision made even more clear W.J.A.'s conclusion that "the presumed damages doctrine's continued vitality lies merely in "permitting a plaintiff to survive summary judgment."

Finally, the Court rejected plaintiff's entreaties to interpret the one-year statute of limitations for defamation to permit a "discovery rule," that could toll the statute when a case involves confidential publications. The Court said the statute's "clear and unqualified language requires all libel claims be made within one year of the date of publication."

Bruce S. Rosen, a DCS member and partner in McCusker, Anselmi, Rosen & Carvelli, P.C., Florham Park, N.J., was on the brief filed by Frank L. Corrado of Barry, Corrado & Grassi, Wildwood, N.J. for amicus American Civil Liberties Union of New Jersey. Plaintiff was represented by Thomas J. Smith and John F. Olsen of K&L Gates; Respondent Hyman Beck & Co. was represented by Philip Sellinger of Greenberg Traurig, Florham Park, N.J.: Respondent First Advantage Litigation Reports was represented by Mark S. Melodia of Reed Smith; amicus N.J. Press Association was represented by Thomas J. Cafferty of Gibbons, Newark, N.J.,

Court Dismisses Defamation, Emotional Distress Claims Against TV Station

Court Applies Libel-Proof Doctrine

By Adrianna C. Rodriguez

The Fayette County, Kentucky, Circuit Court dismissed claims for defamation and intentional infliction of emotional distress brought by a career criminal against Gray Television Group, Inc., and its local television station WKYT-TV for its accurate reporting of his arrest on charges of kidnapping and raping a woman. The claims were part of a lawsuit that also included various civil rights claims against the two arresting officers, the police department, and the victim. *Gunn v. WKYT-TV Assumed Name Corporation of Gray Television Group Inc., et al.*, No. 15-CI-224 (Fayette Cir. Ct. Jun. 10, 2015).

Judge Thomas L. Clark dismissed both claims against WKYT holding that given Plaintiff's lengthy criminal history, Plaintiff was "libel proof"—he had no pre-existing reputation worth protecting.

Judge Clark dismissed both claims against WKYT holding that given Plaintiff's lengthy criminal history, Plaintiff was "libel proof"—he had no pre-existing reputation worth protecting.

It is the second decision in less than a year in Fayette County Circuit Court applying the libel-proof plaintiff doctrine to dismiss defamation claims brought by criminal defendants against WKYT for its truthful and accurate reporting on their cases. *See Doneghy v. WKYT, 27 Newsfirst*, 42 Media L. Rptr. 2603, No. 14-CI-2888 (Fayette Cir. Ct. Oct. 14, 2014) (Ishmael, J). Prior to the *Gunn* and *Doneghy* decisions, no state court in Kentucky had explicitly recognized the doctrine.

Background

Plaintiff Demetrius Gunn had a lengthy criminal history spanning more than two decades, including convictions for assault and various drug-related offenses, when he was arrested on January 21, 2014 on charges of kidnapping and raping a woman at knife point. WKYT reported Plaintiff's arrest and upcoming arraignment based on information obtained from police records.

Plaintiff did not dispute the fact of his arrest, or that at the time of WKYT's broadcast, he was facing charges of kidnapping and rape. Instead, he alleged that the fact that WKYT maintained the story reporting his arrest on its website after the charges were dropped and did not report on the charges being dropped damaged his reputation and caused him emotional

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distress. He sought a court order requiring WKYT to remove the news story from its website and compelling it to publish a new story reporting that the charges against him had been dismissed.

Circuit Court's Decision

In dismissing the claims, the Court held that as a matter of law, WKYT's news report was a fair and accurate account of plaintiff's arrest and charges as reflected in police records and that "WKYT had no obligation to broadcast a follow-up report after Gunn's charges were dropped." The Court further held based on an affidavit from the WKYT's news director that the station did not act with malice in making the news report.

As an additional ground for dismissal, and relying on its earlier decision in *Doneghy*, the Court noted that "[e]ven if the Report were actionable, Gunn could not show the Report caused reputational damage given his lengthy criminal history as set forth in certified court documents of which this Court takes judicial notice."

Finally, the Court noted that the relief Plaintiff sought was unconstitutional and that it was well-settled that "the Court may neither restrain speech, nor compel it."

Charles D. Tobin and Adrianna C. Rodriguez with Holland & Knight LLP's Washington, D.C. office, and Mark Flores, with Frost Brown Todd LLC in Lexington, Kentucky, represented Gray Television Group Inc., owner of WKYT-TV, in both cases.

Recent MLRC Publications

Model Policy on Police Body-Worn Camera Footage
Several federal, state, and local bodies are presently considering policies regarding public access to police body camera recordings. The MLRC has developed and adopted a Model Policy on this topic, which states that such tapes should generally be available for public inspection, subject to exemptions in existing public records laws. A set of principles is also offered as a guide for legislators and policy-makers.

Practically Pocket-Sized Guide to Internet Law: 2015 Update
23 concise articles on a wide-range of Internet law questions that come up in day-to-day media law practice.

MLRC Bulletin 2015 Issue 1: Legal Frontiers in Digital Media
Closing The Frontier – The FCC's "Open Internet" Order; Emerging Themes In Data Breach Litigation: What In-House Counsel Need To Know; 2015 MLRC International Roundtable; Emerging Legal Issues In The Internet Of Things; Did Police Officers Violate The First Amendment By Editing Wikipedia?

Prosecutor's Blog and Tweets Not State Action

No Connection Between Official Duties and Online Political Commentary

In an interesting analysis of state action in the context of social media, the Ninth Circuit affirmed dismissal of a Section 1983 claim against a Los Angeles county prosecutor who blogs after hours about conservative politics, media bias and criminal law. *Naffe v. Frey*, No. 13-55666 (9th Cir. June 15, 2015) (Tashima, Tallman, Nguyen, JJ.).

The court held that plaintiff failed to allege any facts to transform defendant's personal blogging into an effort to harm her under color of law.

Background

If we were to consider every comment by a state employee to be state action, the constitutional rights of public officers to speak their minds as private citizens would be substantially chilled.

Defendant John Patrick Frey is a prosecutor in the gang unit of the Los Angeles County District Attorney's office. He publishes the political blog Patterico's Pontifications. On the blog, Frey notes that he is a deputy district attorney but adds the disclaimer that "The statements made on this web site reflect the personal opinions of the author. They are not made in any official capacity, and do not represent the opinions of the author's employer." His Twitter page includes a similar disclaimer.

At issue were comments about plaintiff Nadia Naffe, herself a conservative activist. Naffe had worked on video sting operations with conservative activist James O'Keefe until the two had a falling out. Taking the side of O'Keefe in the dispute, Frey on his blog described Naffe as "a liar, illiterate, callous, self-absorbed, despicable, a smear artist, dishonest, and absurd." In a tweet he questioned whether Naffe had broken the law by accessing emails belonging to O'Keefe. Frey also posted a deposition transcript of Naffe from an unrelated prior litigation containing her social security number and other personal information.

Naffe sued Frey in federal court under Section 1983 alleging his blog posts and tweets amounted to a threat to prosecute and that Frey intimidated her from exercising her First Amendment rights. Naffe also sued Frey and other defendants for defamation, invasion of privacy and related claims under state law.

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Patterico's Pontifications

Harangues that Just Make Sense

PATTERICO! Public Enemy #1

10/4/2012

NADIA NAFFE SUES PATTERICO, MRS. PATTERICO, AND OUR BOSS

Filed under: Brett Kimberlin,General,Nadia Naffe,Neal Rauhauser — Patterico @ 7:42 am

I have learned that my wife and I are being sued by Nadia Naffe, who leveled accusations at James O'Keefe last year, and was the subject of criticism at this blog earlier this year. Also named in the lawsuit are Los Angeles County, and Steve Cooley, the District Attorney of Los Angeles County. The complaint has been filed in the U.S. District Court in the Central District of California, Case No. 2:12-cv-08443-GW-MRW, and is captioned Nadia Naffe v. John Patrick Frey, et al.

Brett Kimberlin associates have played a role in instigating this lawsuit. Kimberlin's associate Neal Rauhauser recently admitted in a complaint to my office that he introduced Naffe to attorney Jay Leiderman:

I brought this situation to the attention of Los Angeles attorney Jay Leiderman, then introduced he and Naffe, and he is now representing her in a

Defendant's blog. Click to read.

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State Action Analysis

The Ninth Court noted that it had never decided whether a state employee who "moonlights as a blogger" acts under color of state law. The essential question was whether Frey used his position as a prosecutor to harm plaintiff. Deciding that question in the negative, the court noted that while Frey used his knowledge and experience as a prosecutor to inform his social media posts, "that alone does not transform his private speech into public action.... Indeed, if we were to consider every comment by a state employee to be state action, the constitutional rights of public officers to speak their minds as private citizens would be substantially chilled to the detriment of the marketplace of ideas." (citations omitted).

Here Naffe's bare claim that Frey was acting in his official capacity as a prosecutor was insufficient to state a claim under the pleading requirements of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

State Law Claims

Plaintiff's trip to the Ninth Circuit was not without some success. The Court reinstated plaintiff's state law claims for defamation and privacy, holding the district court erred in dismissing them for lack of subject matter jurisdiction. The district court dismissed, finding that plaintiff failed to show by a preponderance of evidence that the amount in controversy was more than $75,000. However, all that was required was an allegation that the amount in controversy exceeded the jurisdictional threshold and the district court should have accepted plaintiff's pleading that her claims for injury to reputation, privacy and distress satisfied the jurisdictional amount.

Plaintiff was represented by Eugene G. Iredale, Iredale and Yoo, APC, San Diego. Defendant was represented by Ronald D. Coleman, Archer & Greiner PC, Hackensack, NJ. Professor Eugene Volokh, UCLA School of Law, represented amicus Digital Media Law Project.

BBB Wins Injurious Falsehood, Tortious Interference Claim Over Consumer Warning

Statements Not "Of and Concerning Plaintiff; Opinion

By Joseph E. Martineau and J. Nicci Warr

When Others First, a Michigan charity, mailed solicitations for car donations to St. Louis consumers, the St. Louis Better Business Bureau ("BBB") investigated and issued a News Warning to consumers. The Warning, which was also posted on the BBB's website, urged caution when dealing with the charity in light of the charity's association with Rick Frazier, a for-profit fundraiser identified in some documents as the charity's founder who had previously been publicly "criticized for alleged improprieties in running similar programs." The Warning also noted a possible conflict of interest on the part of Maurice Banks, an officer of the charity who resigned and then entered into his own for-profit contracts with the charity. The Warning noted that both for-profit contracts appeared lucrative for the two for-profit fundraisers.

In its investigation prior to the issuance of the Warning, representatives of the charity told the BBB that Frazier was not a "founder" of the charity and that the public reports to that effect emanated from mistaken promotional materials generated by a careless public relations firm. It also advised the BBB that previous lawsuits against Frazier and his companies that had generated negative publicity were settled on favorable terms. Representatives of the charity also denied that Banks had any conflict of interest because he had resigned from his role with the charity before taking on the for-profit contracts.

The Warning, which was also posted on the BBB's website, urged caution when dealing with the charity.

The Warning included all these denials.

Michigan Lawsuit/Lack of Personal Jurisdiction

When the BBB refused to take-down the Warning, the charity brought claims for defamation and tortious interference with its charitable endeavors against the BBB in the United States District Court for the Eastern District of Michigan. *Others First, Inc. v. The Better Business Bureau of Eastern Missouri and Southern Illinois*, 2:14-cv-12066-GCS-PJK (E.D. Mich Nov. 17, 2014). The charity claimed that the Warning falsely identified Frazier as its founder and that Banks had no conflict of interest.

The BBB moved to dismiss the Michigan lawsuit based on lack of personal jurisdiction. In response, the charity acknowledged that general personal jurisdiction could not be exercised because the BBB did not have "continuous and systematic" contact with Michigan. However,

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it claimed that specific jurisdiction existed based upon its Michigan location, phone calls and e-mails to Michigan made by the BBB in the course of its investigation, the publication of the Warning on the internet, and the BBB's use of Search Engine Optimization ("SEO") to ensure prominence of the Warning to persons conducting an internet search.

The District Ccourt analyzed the case using the two commonly-accepted, but not identical, criteria for ascertaining personal jurisdiction based upon internet publications. Ultimately, the Court agreed with the BBB and ruled that personal jurisdiction did not lie.

First, the Court looked to the *Calder v. Jones*, 465 U.S. 783 (1984) "effects test." The Court noted that the Sixth Circuit construed the *Calder* effects test narrowly and that "the mere allegation of intentional tortious conduct which injured a foreign resident does not, by itself, always satisfy the purposeful availment prong" of the personal jurisdiction analysis. Taking this into account, the Court held that simply having a website that damages a Michigan resident, even if Michigan residency is known, is insufficient to satisfy the due process requirements for personal jurisdiction. The Court noted that, although the Warning was about a Michigan company and posted on the internet, the primary focus and intended audience of the Warning, was St. Louis consumers, not Michigan consumers.

The charity brought claims for defamation and tortious interference with its charitable endeavors against the BBB.

The Court also found it significant that while incorporated and headquartered in Michigan, the charity did not limit its activities to Michigan. Consequently, the charity should expect to be subject to criticism elsewhere for its activities, without the critic being hailed into a Michigan court. The Court also held that e-mails and telephone calls directed to Michigan were for the purpose of investigation, and not soliciting business with or from the charity, and as such, were insufficient to provide the minimum contacts required by due process. For all these reasons, the Court held personal jurisdiction did not lie based on the *Calder* effects test.

Second, the Court analyzed the case under another jurisdictional analysis used for internet-based disputes, as set forth in *Zippo Manufacturing Co. v. Zippo DOT-Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997). Under the *Zippo* test, the determination of whether the operation of a website is sufficient to satisfy personal jurisdiction focuses on the extent to which the website is interactive and establishes repeated on-line contacts with residents of the forum state, as opposed to websites which are passive where the defendant simply posts information. The Court noted that while the BBB's website was somewhat interactive (in that it encouraged persons to contact the BBB for information and to submit complaints), "the majority of the press release serves as a caution to consumers doing business with [the charity] in St. Louis, without any interaction from the consumer." This, along with the fact that the charity did not allege any interaction between the BBB and Michigan residents using the website, caused the

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Court to conclude that personal jurisdiction would not lie under the *Zippo* test. Finding personal jurisdiction lacking under both the *Calder* effects test and the *Zippo* test, the court dismissed the action without prejudice.

Missouri Court Rejects the Suit on its Merits

Within weeks of losing the personal jurisdiction battle in Michigan, the charity filed another federal lawsuit, this time in St. Louis, Missouri. *Others First, Inc. v. The Better Business Bureau of Greater St. Louis, Inc.*, 4:14-cv-02070-RWS (E.D. Mo. April 24, 2015). The lawsuit was nearly identical, but alleged injurious falsehood (instead of defamation) and tortious interference. The change from defamation to injurious falsehood was presumably because the Missouri two-year statute of limitations for defamation had expired, but the five-year statute of limitations for injurious falsehood remained open. Like most states, however, Missouri considers the substantive components and protections of defamation law applicable to claims for of injurious falsehood.

The Court agreed that statements critical of Frazier could not be deemed "of and concerning" the charity.

In its Missouri lawsuit, the charity also alleged that in the interim between dismissal of the federal suit in Michigan and re-filing in Missouri, a Kansas City television station broadcast an investigative news piece concerning the abysmal proportions of charitable donations made by the charity in comparison to the revenues paid to its professional, for-profit consultants. The charity claimed that the BBB had induced the broadcast, but did not identify anything false in the newscast.

The BBB moved to dismiss, claiming a number of procedural and substantive defects in the charity's Complaint—including that statements negative of Frazier were not "of and concerning" the charity—but also seeking dismissal on the grounds that the Warning was based on truthfully-disclosed facts and that the statements advising consumer caution and alerting them to possible conflicts of interests were protected opinion. Because allegations in the Complaint implied that some of the factual background recited in the Warning was inaccurate, the BBB also moved for summary judgment at the same time, including affidavits identifying the factual support for each fact statement made in the Warning.

The charity responded with its own affidavits, denying the substance of the previously-published criticism about Frazier, but never refuting the existence of such earlier reports. It also disputed the claim of a conflict of interest between the charity and its since-retired officer, Banks, but could not refute that the factual basis for the BBB's conflict of interest statement was true. The charity also claimed a need to do discovery to determine whether the BBB issued

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the Warning with bad motives and hoping to benefit a member charity, something it speculated in its Complaint and opposing affidavits.

After reviewing all of the briefing and evidence, the Court granted summary judgment in favor of the BBB. The Court agreed that statements critical of Frazier could not be deemed "of and concerning" the charity. The Court also agreed that "it is indisputably true that Frazier has been criticized for alleged improprieties in running similar programs. That [the charity] does not like the fact that the BBB choose to inform readers that Frazier has been accused by others of improprieties while running other charitable donation programs does not render the statement false or defamatory." Statements in the Warning referencing Frazier's "ties" to the charity and identifying it as his "newest venture" were neither false not defamatory given the indisputable fact that the charity had hired Frazier to run its program. Moreover, the Warning did not state that Frazier was the charity's "founder;" it merely identified the undisputed fact "that he was described as such (albeit "erroneously") in one of its own press releases" and other media.

Regarding the thrust of the Warning—that consumers should exercise caution before dealing with the charity—the Court held that "no reasonable fact-finder could conclude that an expression of caution conveys anything other than an opinion…." The same was true for the conflict of interest statement. The Court agreed that it, too, was protected opinion because it was qualified by a statement that "it appears," and because the underlying factual support was accurately recited. The Court "conclude[d] that no reasonable fact-finder could ever find that the BBB stated anything other than the truth and its seemingly well-informed opinions about [the charity]." Accordingly, the injurious falsehood claim failed.

Because the sole basis for the tortious interference claim was the Warning, the Court held that claim failed as well. The Court noted that the charity spent a "great deal of time and effort in decrying the BBB's motives in publishing the release," but held that statements of opinion are protected "even if made maliciously or insincerely." The Court concluded its opinion with the following:

> If [the charity] dislikes the BBB's opinions, its remedy lies where it found the release—in the free marketplace of ideas—not a court of law. As the release is true and contains protected opinions, the BBB is entitled to judgment as a matter of law on all counts of the amended complaint.

Joseph E. Martineau, a member, and J. Nicci Warr, an associate, of Lewis Rice LLC in St. Louis, Missouri, represented the BBB in both the Michigan and Missouri lawsuits. Robin Luce-Hermann, a member of Butzel Long in Detroit, Michigan, was local counsel for the BBB in Michigan.

Another One Bites the Dust: Minnesota's Criminal Libel Law Struck Down

By Eric Robinson

Another criminal libel statute has been consigned to the dustbin of history, with the Minnesota Court of Appeals holding the state's criminal libel law, Minn. Stat. § 609.765, unconstitutionally overbroad. *Minnesota v. Turner*, No. A14-1408, 2015 Minn. App. LEXIS 31 (Minn. App. May 26, 2015).

This leaves 13 states -- Florida, Idaho, Kansas, Louisiana, Michigan, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Utah, Virginia and Wisconsin -- with criminal defamation laws on the books that remain theoretically viable in some circumstances.

Several states' criminal libel laws have been repealed or held unconstitutional in recent years, including Colorado (repealed in 2012); Washington (repealed in 2009 after a 2008 court ruling finding the statute "facially unconstitutional for overbreath and vagueness."), Utah (one provision repealed in 2007, although another remains); New Mexico (2006 trial court ruling holding statute unconstitutional); Puerto Rico (repealed 2005).

Another criminal libel statute has been consigned to the dustbin of history, with the Minnesota Court of Appeals holding the state's criminal libel law unconstitutionally overbroad.

Background

The Minnesota case stemmed from a sexually-explicit advertisement placed by defendant Timothy Robert Turner, age 50, in the Craigslist personals section, using the names and cell phone numbers of his ex-girlfriend and the ex-girlfriend's 17-year-old daughter. In response to the ad, they received numerous explicit phone calls and e-mails from men seeking to have sex with them.

Turner was charged with two counts of criminal defamation under § 609.765, which provides that "[w]hoever with knowledge of its defamatory character orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed is guilty of criminal defamation … ." The statute provides exemptions defamatory matter that "is true and is communicated with good motives and for justifiable ends;" communication is absolutely privileged; "fair comment made in good faith with respect to persons participating in matters of public concern;" a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; communication covered by the common interest privilege.

Minnesota's criminal defamation statute dates from the 1890s. It was last codified in 1963, prior to the U.S. Supreme Court's decisions in *New York Times v. Sullivan*, 376 U.S. 254,

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(1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964). In *Garrison*, the Court extended the *New York Times* actual malice requirement to prosecutions of criminal defamation of public figures. *Garrison* also held that criminal defamation statutes must allow truth as an absolute defense when the offending statements involve "criticism is of public officials and their conduct of public business." Garrison at 72-73.

Turner admitted posting the ad, but denied that it constituted criminal defamation. In a motion to dismiss the charges, he also challenged the constitutionality of the criminal libel statute, saying it was overbroad and vague, and that application of the statute violated his First Amendment rights. District Court Judge Amy R. Brosnahan rejected these arguments, and after a stipulated facts bench trial found Turner guilty and imposed a $900 fine, a 30-day jail sentence, and two years of probation. She also ordered Turner to write a letter of apology. The penalties were stayed pending appeal.

Appeal from Conviction

In that appeal, Turner revived the constitutionality arguments, based on the statute not providing for truth as an absolute defense and not requiring actual malice with regard to matters of public concern. The Electronic Frontier Foundation submitted an amicus brief reinforcing these points. In its brief the state actually conceded that the statute was overbroad in its appellate argument, but argued that the court should read and applied narrowly.

But in an opinion by Judge Denise Reilly, the three-judge appeals panel unanimously concluded that the statute was overbroad "because it does not exempt truthful statements from prosecution and, as applied to matters of public concern, does not require the state to prove 'actual malice' before imposing liability." Slip op. at 9, 2015 Minn. App. LEXIS 31, at *11. The appeals court also rejected the state's invitation to read the statute narrowly to overcome these deficiencies, saying that the state's interpretation "would require a rewrite" of the section, which "would constitute a serious invasion of the legislative domain." Slip op. at 13, 2015 Minn. App. LEXIS 31, at *15.

"[A]lthough appellant's conduct was reprehensible and defamatory," the appeals court concluded, "we cannot uphold his conviction under an unconstitutional statute." Slip op. at 13, 2015 Minn. App. LEXIS 31, at *15.

After the appellate ruling, the prosecutor told the Associated Press that she could have charged Turner with disorderly conduct, but that charge didn't seem adequate.

Criminal Defamation Law

There is some evidence of an uptick in criminal defamation prosecutions in recent years in response to online postings. An examination of the 70 criminal libel prosecutions in Minnesota

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from 1993 through 2015 by James Eli Shiffer, editor of the watchdog and data team at the Minneapolis Star-Tribune, found only six that resulted in jail time; three of these – one each in 2012, 2013 and 2014 – involved internet posts. Another study of criminal defamation prosecutions, in Wisconsin, found that the number of cases almost doubled from 1999 through 2007, compared with from 1991 through 1998, due to cases stemming from Internet content.

Criminal Libel an Archaic Notion

In a separate development, four weeks after the Minnesota appeals ruling the district attorney for New Orleans dropped criminal defamation charges against a man who wrote letters to relatives of the judge who oversaw a 2009 criminal trespassing trial against the man. In a statement, the D.A.'s office stated that "although the defamation statute remains on the books, multiple rulings from the United States Supreme Court as well as the Louisiana Supreme Court have rendered it effectively unconstitutional."

The U.S. Supreme Court recognized the archaic nature of criminal defamation in its decision in *Garrison*:

> Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation." Garrison at 69, quoting Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963).

Yet in *Garrison* the Court did not hold that criminal libel was unconstitutional per se, but that it could not be applied to statements about public officials without a finding that the defendant speaker had acted with actual malice.

Over the years, most states have repealed their criminal defamation laws, or courts have struck them down under broader interpretations of the First Amendment than the court used in *Garrison*. Most of the remaining criminal libel statutes have problems similar to the Minnesota and Louisiana statutes, and are vulnerable to constitutional challenge. If prosecutors continue to cite these laws in their attempts to punish internet miscreants, there are likely to be more decisions striking down these laws.

Meanwhile, an increasing number of states are enacting laws that specifically address the problem of "revenge porn" and false, malicious online postings, without the constitutional problems inherent in applying archaic criminal defamation statutes to these cases.

Eric P. Robinson is co-director of the Press Law and Democracy Project at Louisiana State University and of counsel to The Counts Law Group.

Florida Court Applies Privilege To ABC News Outtakes In Murder-For-Hire Case

By Charles D. Tobin

A Florida state court will not let the defendant in a murder-for-hire case subpoena outtakes of an ABC News *20/20* investigation that closely followed detectives' behind-the-scenes work. Order Denying Defendant's Motion for Subpoena Duces Tecum, *State v. Luongo*, Case No. 14-13813F10A (Fla. 17th Cir. Ct. June 11, 2015). This is a significant application of the reporter's privilege in the context of a subpoena issued by a criminal defendant.

Background

Jacqueline Luongo was already in jail awaiting trial for allegedly murdering a Ft. Lauderdale woman, stashing her body in a bedroom closet, and trying to cash checks made out to the victim. If the charges were proved she could possibly face the death penalty. The prosecution's key witness in the murder case is Luongo's former roommate, Maria Calderon. A jail informant tipped off police that Luongo allegedly sought to engage a contract killer to eliminate Calderon before the murder trial.

After that tip, ABC News *20/20* followed months of work by the Broward County Sheriff's Office as they planned a sting operation. Journalists had unprecedented access as: an undercover police officer responded to Luongo's solicitation by meeting with her in prison; detectives then staged and photographed a fake murder scene in the Everglades, where Calderon pretended that she had been killed; and the detective returned to the jail to show Luongo the photos. The sheriff's office provided jail recordings of Luongo's solicitation of the undercover officer to *20/20*.

Luongo was indicted, in addition to the murder charge she faced, on a new murder-solicitation charge. ABC aired the story on January 9, 2015.

In the ensuing prosecution, Luongo's public defender applied to the court for a subpoena to ABC for all of *20/20*'s "unedited video footage and final production version" of the

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story. In court papers, defense counsel argued that they wanted the footage for potential impeachment, "to show interest, motive and bias of the state's witnesses."

ABC filed a motion to quash citing the three-part test under Florida's statutory shield law, Fla. Stat. § 90.5015, and the First Amendment. The privilege in Florida requires the party seeking materials to make a "clear and specific showing" that: (a) the information is relevant and material to unresolved issues; (b) the information cannot be obtained from alternative sources; and (c) a compelling interest exists for requiring disclosure.

ABC argued that Luongo – who, under Florida's criminal procedure needs court permission to issue subpoenas – had not yet even sought subpoenas for the state's witnesses, including the alleged victim of the plot, the detective who masqueraded as a hitman, or any of the other law enforcement officers. ABC further argued that, with no testimony in the record, the "interest, motive and bias" of witnesses was not even a relevant or unresolved issue in the case.

The court held a hearing on February 12, 2015. When defense counsel at the hearing pressed for *in camera* review of the footage, the judge asked for briefing on that issue. He also asked for a list of evidence the prosecution had already turned over to defendant.

Luongo's public defender applied to the court for a subpoena to ABC for all of 20/20's "unedited video footage and final production version" of the story.

In its supplemental brief, ABC argued that for *in camera* review of material arguably covered by any legal privilege, the party seeking the material must make at least a preliminary showing that it can overcome the privilege claim. ABC also argued that, especially given the shield law requirement for a "clear and specific showing," the court should deny *in camera* review where the defense had produced no supportive evidence at all.

Circuit Court Decision

In his five-page order on June 11, 2015, Circuit Judge Martin J. Bidwell agreed with the statutory and First Amendment argument. He held that, as an initial matter, the investigation coverage was a "newsworthy event" and therefore covered by privilege. He observed that in the context of a criminal prosecution, defendant's Fifth and Sixth Amendment rights are balanced against the First Amendment protection of the press, but also noted that the Florida Supreme Court emphasized "the strong responsibility of the courts to protect the rights of a free press."

The judge rejected the defense's effort to invoke an exception to the statute for "physical evidence, eyewitness observations, or visual or audio recordings of crimes." That exemption was inapposite, the judge held, because "video recordings of interviews of the participants in the case are not physical evidence of a crime or visual or audio recordings of a crime." He

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further noted that law enforcement officers had already provided the defense with all recordings they made of the crime, defined as "the alleged act of the defendant actually soliciting assistance from undercover officers to murder the witness."

As to potential impeachment material, the court found that Luongo had not established the information unavailable from alternative sources, such as depositions, and that her compelling need for the material "is entirely speculative."

The court concluded**:** "When the claim of need is so speculative and the witnesses have not even been deposed, the privilege protects ABC from disclosure."

ABC was represented by Judith M. Mercier and Charles D. Tobin, Holland & Knight LLP, Orlando and Washington, D.C., and Indira Suh Satyendra, Principal Counsel, ABC, Inc., New York, N.Y.

Pennsylvania's Revictimization Relief Act Struck Down

Deemed "Manifestly Unconstitutional"

By Eli Segal and Amy Ginensky

On April 28, 2015, Chief Judge Christopher C. Conner of the United States District Court for the Middle District of Pennsylvania struck down Pennsylvania's six-month-old Revictimization Relief Act as "manifestly unconstitutional." *Abu-Jamal v. Kane.*

Drafted in response to the selection of Mumia Abu-Jamal—in prison for life for the murder of a Philadelphia police officer—as a Vermont college's commencement speaker**,** the Act permitted courts to enjoin and penalize "conduct" by an "offender" that caused "mental anguish" to a "personal injury crime victim" or otherwise "perpetuate[d] the continuing effect of the crime on the victim." Further, according to the legislative history, the Act applied to third parties—like the press—who publish such speech. After a consolidated bench trial on the merits for two separate lawsuits challenging the Act's constitutionality, the Court permanently enjoined its enforcement, deeming the law "unlawfully purposed, vaguely executed, and patently overbroad in scope." (Op. at 2.)

The Act permitted courts to enjoin and penalize "conduct" by an "offender" that caused "mental anguish" to a "personal injury crime victim" or otherwise "perpetuate[d] the continuing effect of the crime on the victim."

The Act and Its Genesis

On September 29, 2014, Goddard College, a small school in Vermont, announced that the undergraduate graduating class had chosen Abu-Jamal, a Goddard alumnus, to deliver a pre-recorded commencement address. Just three days later, Pennsylvania State Representative Mike Vereb introduced the Revictimization Relief Act, imploring his fellow legislators that "[a] convicted murderer is still traumatizing the victim's family[,] it needs to stop[, and w]e need to ensure this doesn't happen to any other victim or their family." Within three weeks, on October 21, the Government signed the Act into law.

The Revictimization Relief Act, which was enacted as an amendment to Pennsylvania's 1998 Crime Victims Act, provided in full:

> (a) ACTION.-- In addition to any other right of action and any other remedy provided by law, a victim of a personal injury crime may bring a civil action

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> against an offender in any court of competent jurisdiction to obtain injunctive and other appropriate relief, including reasonable attorney fees and other costs associated with the litigation, for conduct which perpetuates the continuing effect of the crime on the victim.
>
> (b) REDRESS ON BEHALF OF VICTIM.-- The district attorney of the county in which a personal injury crime took place or the Attorney General, after consulting with the district attorney, may institute a civil action against an offender for injunctive or other appropriate relief for conduct which perpetuates the continuing effect of the crime on the victim.
>
> (c) INJUNCTIVE RELIEF.-- Upon a showing of cause for the issuance of injunctive relief, a court may issue special, preliminary, permanent or any other injunctive relief as may be appropriate under this section.
>
> (d) DEFINITION.-- As used in this section, the term "conduct which perpetuates the continuing effect of the crime on the victim" includes conduct which causes a temporary or permanent state of mental anguish.

18 Pa. C.S. § 11.1304. As this reproduction of its entire text makes clear, the Act did not define the term "offender." In addition, while the Act stated that "conduct which perpetuates the continuing effect of the crime on the victim' includes conduct which causes a temporary or permanent state of mental anguish," it was silent about what else "conduct which perpetuates the continuing effect of the crime on the victim" "includes."

The definitions section of the Crime Victims Act does not clarify either of these issues, but does contain three other relevant definitions that collectively broadened the scope of the Revictimization Relief Act beyond its plain language. First, the Crime Victims Act defines "personal injury crime" as "[a]n act, attempt or threat to commit an act which would constitute a misdemeanor or felony" under the sections of the Pennsylvania Crimes Code relating to "criminal homicide," "assault," "kidnapping," "sexual offenses," "arson and related offenses," "robbery," "victim and witness intimidation," and various vehicular crimes resulting in death or bodily injury. 18 Pa. C.S. § 11.103. Second, the Crime Victims Act defines "victim" to include all of the following:

> (1) A direct victim.
>
> (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.

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> (3) A minor child who is a material witness to any of the following crimes and offenses . . . committed or attempted against a member of the child's family: . . criminal homicide [,] aggravated assault[,] rape[.]
>
> (4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé . . . except where the family member is the alleged offender.

Id. Third, the Crime Victims Act defines "family," "when used in reference to an individual"—as in the fourth part of the "victim" definition—to encompass:

> (1) anyone related to that individual within the third degree of consanguinity or affinity;
>
> (2) anyone maintaining a common-law relationship with that individual; or
>
> (3) anyone residing in the same household with that individual.

Id.

What is more, the Revictimization Relief Act's legislative history shows the Act was intended to reach not only "offenders" themselves, but also third parties who publish "offender" speech. Indeed, when asked this very question during the House Judiciary Committee hearing on the law, the Committee Counsel said that "the court would have broad power to stop a third party who is the vessel of that conduct or speech from delivering it or publishing that information."

The Lawsuits

In short order, two groups of plaintiffs filed lawsuits in federal court in Harrisburg against the Pennsylvania Attorney General and the Philadelphia District Attorney—both charged with enforcing the statute—contending that the Act was unconstitutional due to its content-based restriction of speech, its vagueness, and its overbreadth. The two suits featured between them 19 plaintiffs who frequently engage in public speaking of one kind or another—including Abu-Jamal and four other current Pennsylvania inmates, four formerly incarcerated individuals who share their own experiences with a wide range of audiences to help reduce crime and facilitate successful prisoner reentry, and ten advocates and journalists who rely on and publish speech

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by Pennsylvania inmates in order to inform the public and spur government action regarding issues of public concern. The current and former inmates sued based on the Act's restriction of their own First Amendment right to free expression. The third parties did so, too, in addition to arguing that the Act chilled their "offender" sources from speaking with them and thus also restricted their First Amendment right to listen.

The Reporters Committee for Freedom of the Press, the Pennsylvania NewsMedia Association, American Booksellers for Free Expression, and the Freedom to Read Foundation joined the effort as well, filing an amicus brief that highlighted the threat that the Act posed to criminal-justice-related journalism.

All nineteen plaintiffs survived a motion to dismiss by the Attorney General for lack of standing. Even though the Act had never been enforced, the Court held there to be a credible threat of future enforcement by the Attorney General sufficient to constitute "injury in fact" for Article III standing purposes. In so holding, the Court stressed that the offender plaintiffs were the explicit target of the Act, the Attorney General refused to foreswear future enforcement against any of the plaintiffs, and the Act's mere existence had already chilled plaintiffs—both offenders and third parties—from exercising their First Amendment rights. (The Court did dismiss the District Attorney, who, unlike the Attorney General, disavowed any intent to enforce the Act unless and until a court found it to be constitutional.)

Judge Conner included powerful prose that is a welcome and versatile addition to the tool belts of First Amendment litigators.

"Manifestly Unconstitutional"

The Court consolidated the two suits into a single, March 30, 2015, bench trial on the merits. Four weeks later, the Court issued its opinion, holding the Act "manifestly unconstitutional" for the three independently sufficiently grounds on which the plaintiffs had focused. (Op. at 2.) First, emphasizing that "[t]he Supreme Court unfailingly rebukes attempts to censure speech based solely on its potential to hurt, disgust, or offend," the Court found the law to be an unconstitutional "embodiment of a content-based regulation of speech." (*Id.* at 12-13.) Second, the Court ruled that the Act was unconstitutionally vague, given its lack of an "offender" definition and the fact that its "central limitation turn[ed] on the unknowable emotive responses of victims." (*Id.* at 16-18.) Third, the Court determined that the Act was unconstitutionally overbroad in light of the virtually limitless array of "offender" speech that might cause a victim mental anguish. (*Id.* at 18-19.)

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Finally, in his conclusion, Judge Conner included powerful prose that is a welcome and versatile addition to the tool belts of First Amendment litigators—including those of us who represent media clients:

> Free expression is the shared right to empower and uplift, and to criticize and condemn; to call to action, and to beg restraint; to debate with rancor, and to accede with reticence; to advocate offensively, and to lobby politely. . . . The First Amendment does not evanesce at *any* gate and its enduring guarantee of freedom of speech subsumes the right to expressive conduct that some may find offensive.

(*Id.* at 23-24.) The Attorney General chose not to appeal.

The plaintiffs in Abu-Jamal v. Kane *were represented by a team that included David Shapiro of Northwestern University Law School and Bret Grote of the Abolitionist Law Center. The plaintiffs in* Prison Legal News v. Kane *were represented by a team that included Eli Segal and Amy Ginensky of Pepper Hamilton LLP and Vic Walczak and Sara Rose of the ACLU of Pennsylvania.*

ECHR Grand Chamber Confirms Liability of Online News Portal for Offensive Comments Posted by Readers

By Dirk Voorhoof

On 16 June 2015 the Grand Chamber of the European Court of Human Rights delivered the long awaited final judgment in the case of *Delfi AS v. Estonia*, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles.

The Grand Chamber has come to the conclusion that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the news portal's freedom of expression, in particular because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis.

Furthermore the steps taken by Delfi to remove the offensive comments without delay after their publication had been insufficient and the 320 euro award of damages that Delfi was obliged to pay to the plaintiff was by no means excessive for Delfi, one of the largest internet portals in Estonia.

Some Background

In an earlier stage of the procedure, the Human Rights Centre (HRC) of Ghent University has expressed its support for the request for referral to the Grand Chamber, after the First Section in its judgment of 10 October 2013 had found no violation of the right to freedom of expression in this case (see the chamber judgment in *Delfi AS v. Estonia*). The HRC has submitted its considerations in a joint letter to the European Court of Human Rights, signed by a list of 69 media organisations, internet companies, human rights groups and academic institutions.

In the letter to the Court, the HRC together with the other signatories, endorsed Delfi's request for a referral due to the concern that the chamber judgment of 10 October 2013 would have serious adverse repercussions for freedom of expression and democratic openness in the digital era. On 17 February 2014 the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber. A critical post on the Chamber judgment in *Delfi AS v. Estonia*, published on Strasbourg Observers can be found here.

The Court's Chamber judgment of 10 October 2013 confirmed the findings by the domestic courts that the Delfi news platform was to be considered a provider of content services, rather

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than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The circumstance that Delfi had immediately removed insulting content after having received notice of it, did not suffice to exempt Delfi from liability.

The reason why Delfi could not rely on the limited liability for internet service providers (ISP) in the terms of Article 12-15 of the E-Commerce Directive (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring) is that the news portal had integrated the readers' comments into its news portal, that it had some control over the incoming or posted comments and that it had invited the users to post comments, having also an economic interest in exploiting its news platform with the integrated comment environment.

The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the *effects* of the non-treating of Delfi as an ISP were compatible with Article 10 of the Convention.

The Grand Chamber's Judgment – a Delphi's Oracle?

The Grand Chamber has confirmed the non-finding of a breach of Article 10 of the Convention, on very similar, but not identical grounds as the Chamber's judgment. For the facts of the case we refer to the Court's judgment of 16 June 2015 and our blog commenting the Chamber's judgment (here). In essence the news portal is found liable for violating the personality rights of a plaintiff who had been grossly insulted in about 20 comments posted by readers on the Delfi news platforms' field for comments, although Delfi had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The plaintiff was awarded 320 euro in non-pecuniary damages.

Regardless of a technical system filtering vulgarity and obscene wordings, regardless of a functioning notice-and-take-down facility, and, most importantly, regardless of an effective and immediate removal of the offensive comments at issue after being notified by the victim about their grossly insulting character, the Grand Chamber shares the opinion that Delfi was liable for having made accessible for some time the grossly insulting comments on its website. The Grand Chamber agrees with the domestic courts that Delfi was to be considered a publisher and deemed liable for the publication of the clearly unlawful comments. The Grand Chamber is of the opinion that Delfi exercised a substantial degree of control over the comments published on its portal and that because it was involved in making public the comments on its news articles on its news portal, Delfi "went beyond that of a passive, purely technical service provider." (§ 146)

The Grand Chamber furthermore refers to the "duties and responsibilities" of internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a

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platform for user-generated comments on previously published content and some users – whether identified or anonymous – engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Grand Chamber, in more general terms states that:

> "where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (…), the Court considers (…) that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties" (§ 159)

The Grand Chamber is of the opinion that the Estonian courts' finding of liability against Delfi has been a justified and proportionate restriction on the portal's freedom of expression. The Court agrees that the Information Society Services Act transposing the Directive on Electronic Commerce (2000/31/EC) into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case since the latter related to activities of a merely technical, automatic and passive nature, while Delfi's activities reflected those of a media publisher, running an internet news portal. The interference by the Estonian authorities in Delfi's freedom of expression was sufficiently foreseeable and sufficiently precisely prescribed by law and was justified by the legitimate aim to protect the reputation and rights of others. While the Court acknowledges that important benefits can be derived from the internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.

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The Special Duties of Care for a News Portal Run on a Commercial Basis

The Court emphasises that the present case relates to a large professionally managed internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them. Furthermore Delfi is considered to have exercised a substantial degree of control over the comments published on its portal. The Grand Chamber notes that Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties,

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but the automatic word-based filter failed to select and remove odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments.

The Court recalls that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats: they were manifest expressions of hatred and blatant threats to the physical integrity of the insulted person. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments that can be qualified as "hate speech", not constituting protected speech under Article 10 of the Convention. The Court notes that as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks.

The Court considers that a large news portal has an obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence and it attaches weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the internet is more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments.

Obliging online platforms to filter or monitor users' comments in order to prevent any possible liability for illegal content creates a new paradigm for participatory online media.

By way of conclusion, the Grand Chamber takes the view that the steps taken by Delfi to remove the offensive comments had been insufficient. Furthermore the compensation of 320 euro that Delfi had been obliged to pay for non-pecuniary damages, was not to be considered as an excessive interference with the right to freedom of expression of the applicant media company. Therefore, the Grand Chamber finds that the domestic courts' imposition of liability on Delfi was based on relevant and sufficient grounds, and that this measure did not constitute a disproportionate restriction on Delfi's right to freedom of expression. By fifteen votes to two, the Grand Chamber holds there has been no violation of Article 10 of the Convention.

Collateral Damage for Online Freedom of Expression?

The attention is to be drawn on one of the Grand Chamber's important considerations that the Delfi case does not concern "other fora on the Internet" where third-party comments can be disseminated, for example an internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum's manager. The Grand Chamber's finding is neither applicable to a social media

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platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby.

The Court indeed emphasizes very strongly the liability when it concerns a professionally managed internet news portal, run on a commercial basis. There are severe doubts however if this limitation of the impact of the judgment is a pertinent one, reserving the (traditional) high level of freedom of expression and information only for social media, personal blogs and "hobby" (§ 116). It is indeed hard to imagine how this "damage control" will help. As the two dissenting judges observe: "Freedom of expression cannot be a matter of a hobby".

The Grand Chamber also makes clear that the impugned comments in the present case mainly constituted hate speech and speech that directly advocated acts of violence. Hence, the establishment of their unlawful nature did not require any linguistic or legal analysis by Delfi, since the remarks were on their face manifestly unlawful. According to the Grand Chamber its judgment is not to be understood as imposing a form of "private censorship". However, the judgment considers interferences and removal taken on initiative of the providers of online platforms as the necessary way to protecting the rights of others, while there are other ways that can achieve the same goal, but with less overbroad (pre-)monitoring of all user generated content or with less collateral damage for freedom of expression and information, such as taking action against the content providers, and effectively install obligations for providers to help to identify the (anonymous) content providers in case of manifest hate speech or other illegal content. Obliging online platforms to filter or monitor users' comments in order to prevent any possible liability for illegal content creates a new paradigm for participatory online media.

Dirk Voorhoof is a professor at Ghent University and first published this article on the website Strasbourg Observer. MLRC assisted in a media amicus brief filed in this case.

New from the MLRC State Legsilative Committee

MODEL POLICY ON POLICE BODY-WORN CAMERA FOOTAGE

Several federal, state, and local bodies are presently considering policies regarding public access to police body camera recordings. The MLRC has developed and adopted a Model Policy on this topic, which states that such tapes should generally be available for public inspection, subject to exemptions in existing public records laws. A set of principles is also offered as a guide for legislators and policy-makers.

Other Side of the Pond: Updates on English and European Media Law

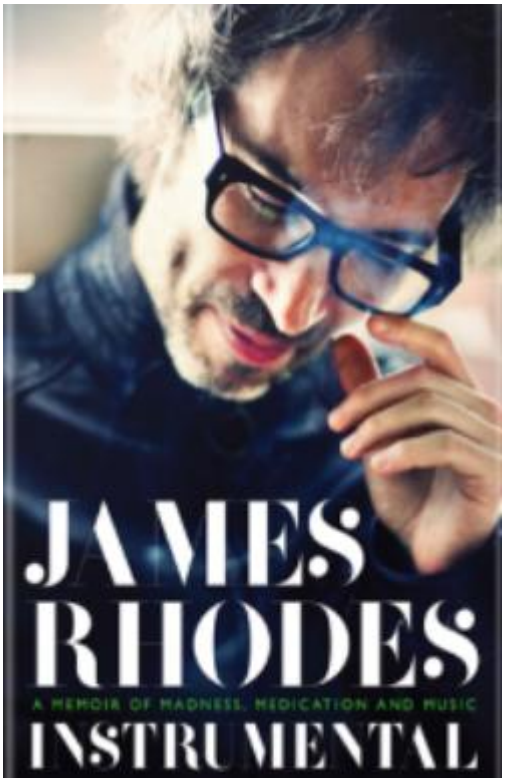
Emotional Distress Claims; Phone Hacking Damages; Delfi and More

By David Hooper

Supreme Court Cuts Back Tort of Intentional Infliction of Mental Suffering

Rhodes v OPO 2015 UKSC32

Rhodes is a distinguished classical pianist who sought to publish his memoirs which detailed the difficulties that he had experienced in life following sexual abuse during his childhood. No one disputed the fact that what he wrote was true. However, his former wife took the view that the son of their marriage who suffered from Aspergers syndrome would be damaged by reading the book. To this end the tort of the intentional infliction of mental suffering enunciated in the 19th century case of *Wilkinson v Downton 1897* 2 QB2 was dusted off. That was a rather curious case where as a practical joke a wife had been told that her husband had sustained a serious accident. The court had held that she could recover the expenses she had had to incur in consequence and damages for the nervous shock she had suffered. By virtue of little more than the fact that the book was dedicated to the son with Aspergers, the Court of Appeal had been persuaded to grant an injunction based on the principles of *Wilkinson v Downton*. The Supreme Court however had little doubt that there was no prospect of establishing the tort on the facts of the Rhodes case.



The tort had three elements; a conduct element, a mental element and a consequences element. The consequences element for liability required evidence of physical harm or a recognised psychological illness. In the appeal the issues related only to the conduct and mental elements. The Supreme Court clearly disapproved of the fact that the Court of Appeal had succumbed to the temptation of providing a remedy where on the facts they had felt it appropriate. The approach of the Supreme Court was radically different. They took the view that there was a legitimate public interest in Rhodes' book and

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that it was necessary to consider the issue of freedom of expression and that insufficient weight had been given to this by the Court of Appeal.

Rhodes had a legitimate purpose in telling his story and the freedom to report material which was true was a basic right to which the law gave a high level of protection. The fact that the son might suffer psychological harm was insufficient to trigger the principles of *Wilkinson v Downton*. For the tort of intentional infliction of mental suffering to be established there had to be words or conduct directed at the claimant for which there was no justification or reasonable excuse. That clearly was not the case here. Furthermore there had to be the mental element that the claimant had to show that the defendant had the intention of causing psychiatric harm or severe mental or emotional distress and again that was far from being the case here.

The case should serve as a salutary reminder of the perils of reviving obscure areas of the law to undermine the established principles of freedom of speech, in order to give a remedyless claimant a remedy.

Damages in the Phone Hacking Trial

Gulati v MGN Limited 2015 EWHC1482

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After a four week trial Mr Justice Mann awarded a total of £1.2 million damages to the eight sample claimants for breach of privacy arising out of a course of phone hacking. There are a number of other claims to be resolved but the intention is that the ruling will be the basis of the determination of the level of compensation in those claims. The awards granted by Mr Justice Mann were so far in excess of the previous highest award in *Mosley v Newsgroup* where Mosley was awarded £60,000 for breach of privacy in respect of the publication of his sado-masochistic afternoon activities which included a video posted on the internet of the action in the flat that the newspaper has sought permission to appeal.

The Judge refused permission but an application is being made to the Court of Appeal. The largest award was £260,050 and the smallest was £72,500. The newspaper had argued that there should be a single award for the distress suffered by the claimants. The Judge preferred a layered approach to produce a figure which he felt would provide an effective remedy and prevent damages for such breaches of privacy being sufficiently low to render privacy rights illusory. He asserted that he was not reintroducing vindicatory damages but that these damages were compensatory. The judgement runs to a formidable 712 paragraphs. The Judge looked at a number of factors:

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- Each and every article admitted to be or held to be the product of phone hacking merited compensation which he held could be in the order of £750 to £40,000 depending on the circumstances and its content.
- There should be a separate award for hacking to compensate generally for the relevant invasion of privacy taking account of the frequency and longevity of the hacking, and the general distress caused.
- There would be separate awards to blagging personal information (that is to say obtaining it from an authorised holder by deception) which took account of the effect that the disclosure of its information had on personal relationships. The Judge took into account the fact that the unexplained disclosure of highly sensitive information could lead additionally to suspicion between the parties of each other as to how the information had been leaked to the paper.
- The Judge also held that there could be awards for aggravated damages resulting in awards that were notably above the sums awarded by the European Court of Human Rights for breaches of privacy. In this context the Judge's finding that the articles would not have been published but for prolonged phone hacking which was known to be unlawful could be taken into account.
- The activities of private investigators connected with the phone hacking could merit separate awards.
- Damages should reflect not only the general level of distress, but also the loss of privacy and autonomy arising out of the infringement of privacy by hacking. The Judge also said damages could reflect damage to the dignity and standing of the claimants.
- The amount of damages was influenced by the extent to which there had been articles over a long period and where invasions of privacy appear greatest. The Judge found that hacking was widespread, institutionalised, longstanding and covert.
- The Judge also felt that it was relevant that the disclosure of certain types of private information was likely to be more significant than others and this should be reflected in the level of the award.
- Equally, matters about significant financial matters and mental and physical health were important, private information, the disclosure of which would sound in higher damages. Information about social meetings were at the lower end of the scale, whereas matters that caused disruption to personal relationships would be towards the higher end of the scale.

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- For each year of phone hacking the starting point was £10,000 and the effect of repeated intrusions into privacy could be cumulative.
- The Judge also factored in, where appropriate, an award of aggravated damages which reflected the nature of the conduct of the defendants and the fact that there had been denials of liability and that the admissions came at a late stage.
- In relation to distress, the Judge applied the eggshell principle in that the defendant has to take the claimant as they find them, for example, if they are particularly likely to be distressed by material which might have caused relatively lesser distress to most people.

The largest award was to the actress and businesswoman Sadie Frost. Details of the awards are to be found in an article written by my colleague Louise Turner. Other awards of interest were the £85,000 awarded to Alan Yentob, a senior BBC executive. No article had been published about him but the Judge found that the defendants had regularly hacked his telephone as assorted famous people were in the habit of leaving messages containing private information which proved to be of interest to tabloid newspapers. There was also an award of £72,500 to a woman whose only claim to fame was that she had been the former girlfriend of a well-known footballer. In a sense, many may have felt more sympathy for a wholly innocent victim than for some of the claimants who thrived on the publicity they received and often sought in the tabloid press.

The Court of Appeal may well take the view that this is a relatively novel area of law, particularly in relation to the award of damages of this proportion. If they give permission, the next hearing in this litigation is likely to be in the early part of 2016.

Delfi AS v Estonia

As discussed in greater detail in Dirk Voorhoof's article, by 15 votes to 2 the ECHR Grand Chamber held on 16 June 2015 that there was no breach of Article 10 in the decision of the Supreme Court of Estonia in holding Delfi liable for the originally unmonitored contents of third party contributions of its internet news portal. This was a surprising decision. Delfi published 330 articles a day operating in Estonian and Russian, and publishing throughout the Baltic states. Readers were invited to add comments and there was a take-down system. Surprisingly there could be as many as 10,000 readers' comments per day.

Trouble flared over an article entitled "SLK destroyed planned ice road" about which Baltic emotions evidently ran very high. There were 20 grossly insulting comments. Delfi were criticised for allowing some of them to remain posted up to six weeks, though they were taken down promptly upon complaint.

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The decision is interesting for its illumination of the consideration of the E-commerce protection under the Estonian Information Society Services Act and its consideration of the relevant laws relating to intermediaries by the European Court of Justice such as *Google France – 2010* – C238-08 on the liability of referencing service providers, *L'Oreal and others 2011* C324-09 relating to the operator of for online market places, *Scarlett – 2011* C70/10 relating to internet service providers, SABAM – 2012 – C360//10 relating to hosting service providers and *Google Spain – 2014* C131/12 relating to the processing of personal data and *Papasavvas 2014* relating to online versions of newspapers.

The Court appears to have reached its decision on the basis that the Estonian site was managed on a commercial basis (which one would imagine most such sites would have been in any event) by the insufficiency of measures to remove the offending material without delay (although the delays do not seem that egregious), and by the fact that the offending posts involved hate speech and incitement to violence (while this is highly regrettable, there must be a risk that initially unmonitored material may be of an offensive nature) and it depends how swiftly it was taken down). The Court were also influenced by the fact that the financial penalty imposed by the Estonia Court was a modest €320 but it does seem that the question of liability is an important matter of principle and shouldn't be influenced by the comparatively modest nature of the financial penalty – the financial consequences of complying with such a Judgement would however be considerably more severe.

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Recent English Decisions

Stocker v Stocker

This was a dispute between husband and wife which the Judge Mr Justice Warby described as unfortunate. The wife had sent to her estranged husband's girlfriend what she viewed as home truths about her husband attempting to strangle her and being a bad father. The publications were by email and Facebook. Publication was limited but the allegations were serious.

The real interest of the ruling in the case in relation to the Judge's approach to the costs sought by each party when reviewed at the Case Management Conference. Under the present rules the Judge can only give directions as to the costs to be incurred in the future and has for budgeting purposes to accept the costs already incurred, although they can be reduced on a post -trial assessment. The claimant's costs were put at £260,000 and those of the defendant's at £575,000. The Judge accepted that defending libel action was expensive and that strictly

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applying a principle of financial proportionality would run the risk of disabling litigants from fairly pursuing their cases. But he did indicate that it was vital that the Court should control recoverable costs of litigation and observed that excessive costs tended to stifle justice and become the main issue in many cases.

There was a need for a progressive acceptance of the need for greater costs control by the courts. The Judge did take the view that the defendant's global costs were in proportion to what was at stake and he therefore cut back on the costs sought in respect of experts and further pleadings and trialpreparation. Of their estimated future costs of £333,000 these were cut back to £207,000 with the Judge being unable to cut back on the already incurred £225,000. The upshot of this ruling is that Mr Justice Warby is sending out a signal that the costs of libel actions should be lower and more proportionate.

BUQ v HRE

Mr Justice Warby issued a salutary warning to those who seek to extract advantage from the threatened publication of private information or to resort to blackmail – a surprisingly popular activity in privacy litigation. In this case the defendant had been found to have threatened to disclose private information about the sex life of a Chief Executive after the defendant had left his employment. An Employment Tribunal had found the defendant to be dishonest and to have attempted to blackmail the claimant. Mr Justice Warby made it clear that private sexual conduct between adults was a prime candidate for the protection of the law, even if the conduct might be unlawful although in this case it amounted to at most infidelity. Victims of blackmailers deserve the protection of the court but a blackmailer who seeks to rely on his Article 10 rights will get short shrift from the court. Summary Judgement was given in favour of the claimant.

Mr Justice Warby made it clear that private sexual conduct between adults was a prime candidate for the protection of the law, even if the conduct might be unlawful.

Recent Official Publications

IPSO (a voluntary regulatory body for the press) recently announced a consultation process for arbitration for defamation and privacy cases against news organisations. The issues include whether arbitration should be mandatory, whether there would be caps on the awards and how legal cost should be dealt with. This is in line with one of the recommendations by Lord Justice Leveson who recommended that arbitration should be fair, quick and inexpensive, and free for complainants to use subject to an adverse order If the

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application was frivolous or vexatious.

Reporting Restrictions

A useful summary has been published by the Ministry of Justice summarising the reporting restrictions in English Courts which reiterates the open justice principle. Likewise, a Practice Direction has been issued by the Lord Chief Justice as to the conduct of contempt of court hearings reiterating the fact that they should be in open court and that the press should have access to such hearings.